LEE KONG HOOI & ORS v. SAZEAN DEVELOPMENT SDN BHD (IN LIQUIDATION) & ANOR

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL SUIT NO: BA-22NCVC-434-07-2017]
15 JULY 2024

Abstract – *(i) Just because an agreement is unsigned or undated, it does not mean that there is no binding contract between the parties or that there is no privity of contract between them. A landowner can be a party to a sale and purchase agreement ('SPA') even if it did not sign the SPA provided that the landowner is required by statute to be a party to the SPA and there is evidence of part-performance by the parties; (ii) If the impossibility of performing a contract is caused by a party's own actions, a contract entered into by parties cannot be frustrated; (iii) There is a statutory presumption that breach of a contract to transfer immovable property cannot be adequately compensated by monetary damages. The purchaser may seek the court to order the vendor to complete the sale by way of specific performance of the contract and the burden shall lay on the vendor to rebut this presumption. The burden of proof is also on the vendor to prove, on a balance of probabilities, that the purchaser, ie, the party seeking specific performance, would be adequately relieved by damages and why specific performance should not be granted. The party seeking specific performance, on the other hand, must satisfactorily demonstrate that they are in a continuous state of readiness and willingness to perform the contract.*

CONTRACT: *Agreement – Sale and purchase agreement – Claim for specific performance – Privity of contract – Purchasers entered into sale and purchaser agreements ('SPAs') with developer and owner for purchase of houses – Landowner appointed developer to develop land but later directed developer to stop all work and vacate land – Development incomplete – Landowner took over possession of land from developer – Landowner offered to terminate SPAs – Suit by purchasers against developer and landowner – Whether there was privity of contract between landowner and purchasers – Whether landowner can be party to SPAs even if it did not sign SPAs – Purpose of Parliament requiring landowner to be party to SPAs of houses in housing development where licensed developer is not landowner – Whether there was concluded and enforceable contract between purchasers and landowner – Whether there was part-performance by parties in SPAs – Housing Development (Control and Licensing) Act 1966 – Housing Development (Control and Licensing) Regulations 1989*

CONTRACT: *Agreement – Sale and purchase agreement – Specific performance – Suit by purchasers against developer and landowner of housing development project – Purchasers entered into sale and purchaser agreements ('SPAs') with developer and landowner for purchase of houses – Landowner appointed developer to develop land but later directed developer to stop all work and vacate land – Development incomplete – Landowner took over possession of land from developer – Landowner offered to terminate SPAs – Purchasers sought order of specific performance of SPAs to complete construction of houses and for payment of liquidated damages for late delivery of houses – Statutory presumption that breach of contract to transfer immovable property could not be adequately compensated by monetary damages – Whether presumption rebutted – Whether purchasers would be adequately relieved by damages – Whether specific performance ought to be granted – Whether purchasers in continuous state of readiness and willingness to perform contract – Specific Relief Act 1950, s. 11(1)*

This was a civil suit brought by the plaintiffs against the developer, Sazean Development Sdn Bhd ('Sazean') and the landowner, Perbadanan Kemajuan Negeri Selangor ('PKNS'), of the housing development project known as Anjung Sari @ Bandar Setia Alam ('Anjung Sari'). PKNS had privatised the development of the land in question and appointed Sazean to develop the same on 'as is where is basis' ('privatisation agreement'). Pursuant to the privatisation agreement, PKNS and Sazean agreed to 'co-operate and assist' each other and do all such acts and things necessary to give full effect to the completion of the 'development works' planned. In consideration of the right to develop the land and PKNS' warranties and covenants under the privatisation agreement, Sazean agreed to pay PKNS 19% of the projected gross sales or actual sales values of the development (whichever was higher) for the double-storey link and semi-detached houses and 21% for the double-storey bungalows ('PKNS' entitlement'). The privatisation agreement did not have an expiry date and would come to an end when PKNS terminates the said agreement. The plaintiffs had entered into sale and purchase agreements ('SPAs') with Sazean and PKNS for the purchase of double-storey bungalows in Phase 2 of Anjung Sari. The SPAs were in the statutory form prescribed in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989') made under the Housing Development (Control and Licensing) Act 1966 ('HDA 1966'). The SPAs with the first and second plaintiffs were signed with Sazean and PKNS while the SPAs with the third, fourth and fifth plaintiffs were signed with Sazean only (they were not signed by PKNS). For various reasons, Sazean failed to complete the development of Anjung Sari. Approximately a year after a stop work order, PKNS and Sazean entered into a settlement agreement where Sazean agreed to: (i) immediately vacate and surrender vacant possession of the land in Phase 2 of Anjung Sari to PKNS; and (ii) deliver to PKNS the issue documents of title for the land, the SPAs and the deposits collected from the purchasers of Phase 2 in the sum of RM3,789,136.32 ('Phase 2 sale

collection'). PKNS, after taking over Phase 2 of the Anjung Sari land and receiving the Phase 2 sale collection, decided not to proceed with the development of Phase 2 of Anjung Sari. PKNS sent to the purchasers of Phase 2 of Anjung Sari several letters in which it offered to terminate the SPAs ('offers of termination'). Some purchasers accepted PKNS' offers of termination and terminated their SPAs but the plaintiffs herein did not. In this civil suit, the plaintiffs primarily sought against Sazean and/or PKNS: (i) an order of specific performance of the SPAs to complete the construction of the houses at Phase 2 of Anjung Sari; and (ii) for the payment of liquidated damages for the late delivery of the houses. In Sazean's defence, it had not breached the SPAs as it had been robbed by PKNS of the opportunity to proceed with the development of Phase 2 of Anjung Sari by PKNS' order to stop work and to vacate the said Phase 2 land and by PKNS taking over the Phase 2 land under the settlement agreement. PKNS defences were that: (i) the plaintiffs' claims against it were untenable and misconceived as it had signed the SPAs with the first and second plaintiffs as a landowner and not as a developer. As for the third, fourth and fifth plaintiffs, there was no privity of contract and no nexus because it did not sign the SPAs with them; (ii) it could not at law be forced to take over and continue the development of Phase 2 of Anjung Sari because Sazean had agreed to undertake the development of Anjung Sari on an 'as is where is' basis under the privatisation agreement and the only warranty that PKNS gave was that it was the registered and beneficial landowner; (iii) it could not be compelled to carry out Sazean's responsibilities and obligations under the SPAs because it did not enter into a novation or assignment agreement or supplementary SPAs with the plaintiffs. The settlement agreement did not in any way impose any obligation on it as the landowner to take over the development of Phase 2 of Anjung Sari; (iv) there was never any contract between PKNS and the plaintiffs for PKNS to develop the Phase 2 land since there was no offer, acceptance and intention to create a legal relationship between PKNS and the plaintiffs for PKNS to develop the Phase 2 land. PKNS had also informed the plaintiffs *via* its offers of termination of the SPAs that it did not intend to develop the Phase 2 land; (v) Sazean was solely responsible for the non-construction of the houses sold to the plaintiffs in Phase 2 of Anjung Sari; and (vi) the SPAs were frustrated as it was impossible to perform it at the time they were entered into. For this reason, pursuant to s. 57(3) of the Contracts Act 1950 ('CA'), any compensation payable to the plaintiffs should be paid by Sazean and not PKNS. The issues that arose were: (i) had the privatisation agreement expired when Sazean and PKNS entered into the settlement agreement and when they entered into the SPAs with the plaintiffs; (ii) was PKNS a party to the SPAs; (iii) was there a privity of contract between the plaintiffs and PKNS under the SPAs; (iv) were the SPAs capable of performance or were the SPAs frustrated; (v) was Sazean and/or PKNS obliged to construct and deliver vacant possession of the houses in

Phase 2 of Anjung Sari; and (vi) what was the plaintiffs' recourse against Sazean and/or PKNS and whether specific performance of the SPAs could be ordered.

Held (allowing claim; ordering landowner to complete construction of houses and ordering developer and landowner to jointly and/or severally pay purchasers liquidated damages for late delivery of houses):

(1) Based on the natural and ordinary meaning of the terms and provisions in the privatisation agreement, the privatisation agreement had not expired at the time Sazean and PKNS entered into the settlement agreement. It was the 'completion date for development' under the privatisation agreement that had expired on 26 November 2012. The facts showed that the privatisation agreement was only terminated by PKNS on 1 November 2019. The terms and provisions of the settlement agreement expressly stated that: (i) the settlement agreement was supplemental to the privatisation agreement; (ii) the privatisation agreement remained in full force and effect; and (iii) the settlement agreement did not diminish the legality, validity and effectiveness of the privatisation agreement. The settlement agreement expressly stipulated that Sazean's and PKNS' rights, liabilities and obligations under the privatisation agreement were not in any way whatsoever affected or impaired by the settlement agreement, save and except as expressly provided in the said agreement. Therefore, the privatisation agreement was in full force and effect as at the date of the settlement agreement on 20 June 2014 and when the plaintiffs entered into the SPAs with Sazean and PKNS in 2013 and 2014. Sazean and PKNS were expressly required by the settlement agreement to continue to perform or cause to be performed all their obligations under the privatisation agreement, subject to the amendments provided in the settlement agreement. These obligations included developing and completing the construction of the houses in Phase 2 of Anjung Sari housing development. (paras 120-125)

(2) In determining whether the SPAs were concluded contracts between the plaintiffs, Sazean and PKNS for the purchase of the houses at Phase 2 of Anjung Sari and whether PKNS was a party to the SPAs – including the ones it did not sign – the purposive rule must be used. The first question that arose was: what was the purpose of Parliament requiring the landowner to be a party to the SPAs of houses in a housing development where the licensed housing developer is not the landowner? The purpose as stated in the long title of the HDA 1966 is to protect the interest of the purchasers and for matters therewith, *ie*, matters connected with the protection of the purchasers. The second question that arose was: where a landowner did not sign the SPAs statutorily prescribed by the HDR 1989, does it mean that the landowner is not a party to the SPAs and there is no concluded and

enforceable contract between the purchaser and the landowner? The answer to the second question was in the negative for the following reasons: (i) article 16.2 of the privatisation agreement stipulated that PKNS must enter into the SPAs upon receipt of a written request from Sazean, and PKNS agreed to abide and/or comply with regs. 5(5)(a), 10 and 11 of the HDR 1989; (ii) regulation 5(5)(a) of the HDR 1989 states that where the licensed housing developer is not the proprietor of the land, no advertisement or sale permit shall be issued and no advertisement or sale could be made for any housing development unless the landowner has executed an agreement with the licensed housing developer that the landowner agrees to: (a) the sale of the land for the housing development concerned; and (b) to abide by reg. 10 of the HDR 1989; (iii) under reg. 10 of the HDR 1989, the landowner is statutorily required to be a party to the contract of sale of any housing development and must agree to the sale of the land for the purposes specified in the SPAs. Pursuant to reg. 11 of the HDR 1989, the contract of sale for the sale and purchase of a housing accommodation in a housing development must be in the form prescribed in Schedule G of the HDR 1989; (iv) there is nothing in the HDR 1989 which requires a SPA in the format prescribed in the Schedules of the HDR 1989 to be signed by the parties to be valid and binding; and (v) the Federal Court in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* and the Court of Appeal in *Heller Factoring (M) Sdn Bhd v. Metalco Industries (M) Sdn Bhd* held that an agreement is a concluded contract even it is not signed by one or both parties, and the agreement could be enforced where there is evidence such as part-performance by one party and acceptance by the other, that the other party had elected to be bound by the agreement. The third question that arose was: was there part-performance by the parties in the SPAs? The answer to the third question was in the affirmative. The plaintiffs had paid the deposits under the SPAs, Sazean had accepted the deposits and PKNS had taken the deposits. Therefore, PKNS was a party to the SPAs with the plaintiffs and the SPAs were concluded and binding contracts between the plaintiffs, Sazean and PKNS. (paras 154-157 & 165)

(3) PKNS submitted that it could not be compelled to carry out Sazean's duties and responsibilities under the SPAs and in so submitting, relied on *Glomac Alliance Sdn Bhd v. Nordin Md Zain*, which he averred was binding on this court under the principle of *stare decisis*. However, there was no merit in the submission by PKNS that there was no privity of contract between PKNS and the plaintiffs under the SPAs because the SPAs were not assigned or novated to PKNS. Accordingly, there was privity of contract between the plaintiffs and PKNS under the SPAs. (paras 168, 179 & 180)

(4) Why were the houses purchased by the plaintiffs under the SPAs in Phase 2 of Anjung Sari were not constructed and vacant possession was not delivered? It was because PKNS did not want to develop the Anjung Sari project on the land which was conceptualised and designed by Saezan. PKNS intended to develop its own housing project on the land and the Anjung Sari project. Sazean would not have known, at the time the SPAs were entered with the plaintiffs that PKNS would not allow it to develop Phase 2 of Anjung Sari and would take back the land before it could commence the construction of the houses in Phase 2 of Anjung Sari. And it could not have known that PKNS, after taking back the land would decide not to develop Phase 2 on the land. Even if the SPAs were frustrated, it was not a 'true frustration' because the impossibility of construction of the houses purchased under the SPAs was caused by PKNS refusal to develop Phase 2 of Anjung Sari after it had taken over the land from Sazean. The SPAs were not frustrated and they were not impossible to perform at the time they were made. If there was frustration of the SPAs, it was self-induced by PKNS and such self-induced frustration was not recognised by law. (paras 204, 205 & 215)

(5) PKNS was obliged to construct and deliver vacant possession of houses that had been sold under the SPAs with the plaintiffs and the other purchasers of Phase 2 of Anjung Sari for the following reasons: (i) based on the terms of the privatisation agreement in connection with the 'development' of the land, as supplemented and varied by the settlement agreement; (ii) Sazean was no longer able to undertake the construction of the houses in Phase 2 of Anjung Sari because its right to enter and occupy the land had been taken away under the settlement agreement; (iii) PKNS' obligation under art. 2.1 of the privatisation agreement to co-operate and assist Sazean and 'do all such acts and things as may be necessary so that full effect may be given to the completion of the development works planned'; and (iv) PKNS' statutory and contractual agreements, under reg. 11 of the HDR 1989 and the SPAs, respectively, to the sale of the houses in Phase 2 of Anjung Sari for the purpose stated in the SPAs. (para 252)

(6) Section 11(1) of the Specific Relief Act 1950 ('SRA') provides that specific performance of a contract may be granted at the discretion of the court, except as otherwise provided in Chapter II of the SRA. There is a statutory presumption under s. 11(2) of the SRA that a breach of a contract to transfer immovable property could not adequately be relieved by monetary compensation. The burden was on the defendants to rebut the presumption in s. 11(2) of the SRA. The burden of proof was also on the defendants to prove on a balance of probabilities that the plaintiffs would be adequately relieved by damages and why specific performance should not be granted. The defendants had not rebutted the

statutory presumption in s. 11(2) of the SRA that a breach of contract to transfer immovable property could not be relieved by monetary compensation. They also failed to discharge their burden of proof that the plaintiffs would be adequately relieved by damages and why specific performance should not be granted. As for the plaintiffs, as the parties seeking specific performance of the SPAs, they must show to the satisfaction of this court that they were in a continuous state of readiness and willingness to perform the contract. The plaintiffs testified that they were ready and willing to continue with the SPAs. The evidence showed that the first and second plaintiffs had obtained loans for payment of 90% of the purchase price of the houses purchased while the third, fourth and fifth plaintiffs testified that they would be paying cash for the balance 90% of the purchase price. Accordingly, the plaintiffs were ready and willing to perform the SPAs. This court must use its discretion under the SRA to order specific performance of the SPAs for PKNS to construct and deliver vacant possession of the houses promised to the plaintiffs under the SPAs. An order of specific performance against Sazean would be fruitless because pursuant to the settlement agreement, Sazean no longer had the right to enter and occupy the land or to undertake any development works on the Phase 2 land. (paras 273, 275, 280, 287-289 & 291-293)

(7) Judgment was given to the plaintiffs and the following declarations/orders were made: (i) Sazean and PKNS failed to construct the houses purchased by the plaintiffs in Phase 2 of Anjung Sari housing development; (ii) PKNS failed and/or refused to construct the houses that were purchased by the plaintiffs in Phase 2 of Anjung Sari housing development even though it had taken over the vacant possession of the land on which houses were to be built and had taken delivery of the deposits paid by the plaintiffs under the SPAs for the purchases of the said houses; (iii) PKNS was hereby ordered to complete the construction of the houses purchased by the plaintiffs in Phase 2 of Anjung Sari housing development and to deliver vacant possession of the said houses to the plaintiffs within 24 months from the date of this judgment; and (iv) Sazean and PKNS were ordered to jointly and/or severally pay liquidated damages to the plaintiffs at the rate of 10% of the purchase price of the houses purchased by the plaintiffs from the date of the expiry of 24 months from the date of the payment of the deposits for the houses under the SPAs until the date of the fourth offer of termination, *ie*, 5 December 2016 by PKNS to the plaintiffs. The plaintiffs were granted leave to apply for consequential orders arising from the orders made in this judgment. Sazean was ordered to pay costs in the sum of RM10,000 each to the first, second and fifth plaintiffs and the sum of RM10,000 to the third and fourth plaintiffs together. PKNS was ordered to pay

costs in the sum of RM30,000 each to the first, second and fifth plaintiffs and the sum of RM30,000 to the third and fourth plaintiffs together. (paras 317 & 319-321)

Case(s) referred to:

Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd [2013] 7 CLJ 18 FC ***(refd)***

Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2021] CLJU 1546; [2021] 1 LNS 1546 CA ***(refd)***

Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd [2014] 7 CLJ 461 CA ***(refd)***

Chua Ngah Chin v. Ng Kie En [1967] CLJU 33; [1967] 1 LNS 33 HC ***(refd)***

Dalmia Dairy Industries Ltd v. National Bank Of Pakistan [1978] 2 Lloyd's Rep 223 ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 3 CLJ 125 FC ***(refd)***

Dato' Yap Peng Eng & Ors v. Public Bank Bhd & Ors [1997] 4 CLJ 115 CA ***(refd)***

Far East Holding Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA ***(refd)***

Formulexcel Sdn Bhd v. Chong Chee Fah [2010] CLJU 1609; [2010] 1 LNS 1609 HC ***(dist)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Glomac Alliance Sdn Bhd v. Nordin Md Zain [2023] 3 CLJ 485 CA ***(refd)***

Government Of The State Of Selangor v. Central Lorry Service & Construction Ltd [1971] CLJU 36; [1971] 1 LNS 36 HC ***(refd)***

Heller Factoring (M) Sdn Bhd v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9 CA ***(refd)***

Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***

Loo Choo Teng & Anor v. Cheok Swee Lee & Ors [2000] 2 CLJ 389 CA ***(refd)***

Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***

Malayan Banking Bhd v. Foo See Moi [1981] CLJU 95; [1981] 1 LNS 95 FC ***(refd)***

Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***

Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***

Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 8 CLJ 163 FC ***(refd)***

Pacific Bunkers Pte Ltd v. Owner Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" & Another Case [2015] CLJU 109; [2015] 1 LNS 109 HC ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Ruhani Baharum & Ors (B-02(1M)(NCVC)-980-05-2016) (Unreported) ***(dist)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Remeggious Krishnan v. SKS Southern Sdn Bhd [2023] 4 CLJ 36 FC ***(refd)***

Ruhani Baharum & Yang Lain lwn. Sazean Development Sdn Bhd & Satu Lagi [2016] CLJU 1241; [2016] 1 LNS 1241 ***(refd)***

SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***

Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***

Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***

Tan Kok Siang v. Kemuning Setia Sdn Bhd [2018] 8 CLJ 546 CA ***(refd)***

Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2016] 10 CLJ 164 CA ***(refd)***

Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v. Bursa Malaysia Securities Bhd [2022] 4 CLJ 854 FC ***(refd)***

Tetuan Wan Shahrizal, Hari & Co v. PP [2023] 4 CLJ 843 FC ***(refd)***

Trip4Asia Sdn Bhd & Anor v. Destini Bhd & Other Appeals [2021] CLJU 1453; [2021] 1 LNS 1453 CA ***(dist)***

University Of Malaya (University Malaya Medical Centre) v. FBSM Ctech Sdn Bhd [2018] 8 CLJ 71 CA ***(dist)***

Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 177 FC ***(refd)***

Wong Yee Boon v. Gainvest Builders (M) Sdn Bhd [2020] 2 CLJ 727 FC ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56(1), 57(1), (2), (3)

Evidence Act 1950, ss. 126, 127, 128, 129

Housing Development (Control and Licensing) Act 1966, ss. 8(1), 11(1)(c), 16M, 16Q, 24

Housing Development (Control and Licensing) Regulations 1989, regs. 1, 5(5)(a), 10, 11, Schedule G

Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d)

Sale of Goods Act 1957, s. 5(2)

Selangor State Development Corporation Enactment 1964, ss. 11, 12

Specific Relief Act 1950, ss. 11(1), (2), 18(1), (3), 19, 20(1)(a)

Other source(s) referred to:

American Jurisprudence, 2nd edn, vol 28, 1966, pp 677-680

Prof Visu Sinnadurai, *Law of Contract,* 4th edn, LexisNexis, 2011, vol 2, para 14.03, p 1169

RK Abichandani, *Pollock & Mulla on Indian Contract and Specific Relief Acts,* 11th edn, vol 1, p 592

Visu Sinnadurai in Contracts Act: A Commentary, LexisNexis, 2015, paras 56.03, 57.25, pp 437, 472

For the plaintiffs - Mohaji Selamat & Muhammad Asif Zahari; M/s Mohaji Hazury & Ismail

For the 1st defendant - Ravichandran Selliah & Puvarnisha Paskaran; M/s S Ravichandran & Anuar

For the 2nd defendant - Ganapathi Ramasamy, Al Sabri Ahmad Kabri & Marlia Mohd Azrin; M/s Al Sabri & Co

Reported by Lina E

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is a civil suit brought by the plaintiffs against the developer and the landowner of the housing development project known as "Anjung Sari @ Bandar Setia Alam" ("Anjung Sari").

[2] The plaintiffs had entered into sales and purchase agreements ("SPAs") with the developer and the landowner for the purchase of double-storey bungalows in Phase 2 of Anjung Sari. The SPAs are in the statutory form prescribed in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989") made under the Housing Development (Control and Licensing) Act 1966 (Act 118) ("HDA 1966").

[3] The issue at the heart of this suit is whether a landowner – who had appointed a developer to develop the land, but who, prior to the completion of the development, had directed the developer to stop all work and vacate the land, and who had taken over from the developer possession of the land, the issue documents of title of the land sold to the purchasers, the SPAs, and the deposits paid by the purchasers – is responsible under the SPAs, the HDA 1966 and the HDR 1989 to complete the construction of the houses sold pursuant to the SPAs.

[4] The landowner in question is the developing giant and investment vehicle of the Selangor State Government, Perbadanan Kemajuan Negeri Selangor (better known as "PKNS"). It is a creature of statute established under the Selangor State Development Corporation Enactment ("PKNS Enactment 1964").

[5] PKNS is the owner of land at Alam Nusantara, Bandar Setia Alam, totalling an area of 614.26 acres held under two block titles: HS(D) 204087 PT 7714 and HS(D) 204091 PT 7718, both in Mukim Bukit Raja, Daerah Petaling, Selangor ("PT 7714" and "PT 7718"). The Anjung Sari project is to be developed on land forming part of PT 7714 and PT 7718, in an area of approximately 50.3 acres (the "land"). PKNS is the second defendant in this suit.

[6] The developer is Sazean Development Sdn Bhd ("Sazean"), a private limited company owned and controlled by former Federal Government Minister, Tan Sri Datuk Panglima Abdul Kadir bin Hj Sheikh Fadzir, and his family. His son, Meor Huzairin Sazali bin Abdul Kadir, who is the Chief Executive Officer of Sazean. Sazean is the first defendant in this suit. Sazean was wound up on 8 August 2019.

[7] The trial of this suit was conducted over 26 non-consecutive days: three days before my predecessor, Che Mohd Ruzima bin Ghazali J (as he then was), and 23 days of trial before me. Twelve witnesses were called for the plaintiffs, two witnesses for Sazean and four witnesses for PKNS.

[8] At the conclusion of the trial, this court gave judgment for the plaintiffs. PKNS was ordered to complete the construction of the houses at Phase 2 of Anjung Sari sold to the plaintiffs pursuant to the SPAs. Both Sazean and PKNS were ordered to jointly and/or severally pay the plaintiffs liquidated damages for the late delivery of the houses.

[9] The full reasons for the decision and the orders made are set out in this judgment.

Material Facts

Privatisation Agreement

[10] PKNS had privatised the development of the land. It had appointed Sazean to develop the land on "as is where is basis" pursuant to a privatisation agreement dated 26 November 2017 ("privatisation agreement") between it and Sazean. Under the privatisation agreement, Sazean undertook to carry out the Anjung Sari development at its own costs, subject to the terms and conditions of the agreement.

[11] Pursuant to art. 2 of the privatisation agreement, both PKNS and Sazean agreed to enter into the agreement for the purpose of carrying out the "development". Development is defined in art. 1.1 as the construction, completion, and sale of double-storey link houses, double-storey semi-detached houses, and double-storey detached houses on the land. Additionally, PKNS and Sazean agreed to "co-operate and assist" each other and do all such acts and things as may be necessary to give full effect to the completion of the "development works" planned.

[12] In consideration of the right to develop the land and PKNS's warranties and covenants under the privatisation agreement, Sazean agreed to pay PKNS 19% of the projected gross sales values, or actual sales values of the development (whichever is higher) for the double-storey link and semi-detached houses, and 21% for the double-storey bungalows (defined as "the PKNS' entitlement") in accordance with the terms and conditions in the agreement. PKNS' entitlement is defined in art. 1.1 of the privatisation agreement as follows:

PKNS' Entitlement	The payment by the Company to PKNS as the consideration in the amount and manner specified in Article 5 of the Agreement which shall be paid by the Company to PKNS out of its financial resources regardless of the fact that the Company will be required (if applicable) to channel all sales proceeds into a Housing Development Account and payments out of that Account are controlled as stipulated thereto.

[13] The PKNS' entitlement detailed in Schedule 3 of the privatisation agreement is RM41,223,000. Schedule 3 is reproduced below:

Schedule 3

(This is read and construed as an essential part of this Agreement)

The Components And Development And PKNS's Entitlement

No	Components	No Of Units	Selling Price (RM)	Gross Sales Value (RM)	PKNS' Entitlement	
					%	(RM)
1	Double Storey Link Houses (22' x 75')	401	310,000	124,310,000	19	23,618,900
2	Double Storey Semi-Detached Houses	6	650,000	3,900,000	19	741,100
3	Double Storey Detached Houses	73	1,100,000	80,300,000	21	16,863,000
	Grand Total	**480**		**208,510,000**		**41,223,000**

[14] Sazean duties and obligations under the privatisation agreement are stipulated in art. 2.2. They are as follows:

> Subject to the terms and conditions of this Agreement and in consideration of and in exchange for the obligations of PKNS under this Agreement, the Company:
>
> a) shall at its own costs and expense apply for and obtain a Housing Developer's License under the provisions of the Housing Development (Control and Licensing) Act, 1966 (Act 188) before carrying out the Development Works;
>
> b) shall carry out the Development Works at its own sole costs and expenses and be entitled to sell and receive the sale proceeds thereof;
>
> c) shall be fully responsible for obtaining all financing required to carry out the Development Works without any recourse to PKNS;
>
> d) shall cause the Guarantors to provide PKNS with the Directors' and/or Shareholder's Guarantee before the launching of the Development;
>
> e) shall strictly comply with all the terms and conditions of this Agreement and the Technical Agreement for Shared Infrastructural Works,

A and the Company hereby guarantees to PKNS that the Development Works will duly be carried out in a workmanlike manner and in accordance with the terms and conditions of this Agreement and the Technical Agreement for shared Infrastructural Works.

[15] PKNS, in turn, warrants that it is the registered and beneficial owner B of the land, that there are no outstanding claims in respect of the land, and that it has the right to enter into the privatisation agreement.

[16] The "completion date for development" of the Anjung Sari project is five years from the date of the privatisation agreement *ie*, 26 November 2012.

C

[17] For various reasons, which is currently the subject matter of an arbitration between Sazean and PKNS, Sazean failed to complete the development of the Anjung Sari project by 26 November 2012.

[18] Article 5.1.2 of the privatisation agreement states that if Sazean fails D to complete the development within the "completion date for development", Sazean must pay the entire balance of PKNS' entitlement outstanding as at the "completion date for development" before it can resume the development. If Sazean fails to do so, it must pay interest at the rate of 10% per annum on the entire outstanding balance of the PKNS' entitlement.

E **[19]** "Extension period of completion date" is defined in art. 1.1 of the privatisation agreement as follows:

Extension Period of Completion Date	subject to this Agreement, any period of extension and/or of the further extension periods to the Completion Date for the Development which shall also include the period the balance of the Development is resumed as stipulated in the proviso in Article 5;

F

Stop Work Order

G

[20] After the "completion date for development" had expired, PKNS did not extend the period for Sazean to resume development of the land.

[21] It did, however, send Sazean a letter dated 8 May 2013 ("stop work order") demanding payment of the PKNS' entitlement in the sum of H RM31,932,722.49. It also ordered Sazean, among others, to stop all work at the site, in particular, the earthworks at Phase 2 of Anjung Sari, and to leave all machineries and equipment at the site. Clauses 2.0, 2.1 and 2.7 of the stop work order are reproduced below:

I 2.0 Seperti yang tuan sedai maklum, tempoh penyiapan kerja-kerja yang diperuntukkan dan termaktub di dalam Perjanjian tersebut telah berakhir dan tamat pada 26 Disember (*sic*) 2012. Sehubungan dengan itu, pihak Tuan adalah diberi notis seperti berikut:

2.1 Berkuat-kuasa serta-merta, untuk memberhentikan kesemua aktiviti di tapak terutamanya melibatkan kerja-kerja pemecahan batu di Fasa 2. Pihak Tuan juga dikehendaki meninggalkan kesemua peralaatan atau mesin atau apa sahaja perkakasan yang berada di tapak. Pihak Tuan diingatkan untuk tidak membawa keluar apa-apa sahaja peralatan atau mesin atau perkakasan atau apa-apa bahan daripada tapak mulai tarikh notis ini.

2.7 Dalam masa TIGA PULUH (30) HARI daripada tarikh ini, mengikut peruntukan Klausa 5.1 dan Jadual Ketiga Perjanjian Penswastaan tersebut [Privatisation Agreement], Phak Tuan dikehendaki untuk membuat pembayaran kepada kami yang merupakan Bahagian PKNS [PKNS' Entitlemen] berjumlah RM31,932,722.49 seperti jadual berikut:

Bil.	Tuntutan	Jumlah (RM)
1.	Pulangan bagi Fasa 1	20,917,701.00
2.	Cukai Taksiran (Januari-Jun 2013)	29,083,36
3.	Perbelanjaan Kos Bersama	10,985,938.13
	Jumlah Besar	**31,932,722.49**

[22] Additionally, PKNS directed Sazean to (i) discharge all charges on all the land with the bridging loan financier, Maybank, and to return all the issue documents of title of all the land to PKNS; and (ii) to deliver (a) an original statement of account in respect of Sazean's facility or loan from Maybank showing the amount owing by Sazean to Maybank; (b) a statement showing the number of units sold in Phase 1 and the amount of payment received in respect of the sale of each unit; particularised details (butiran terperinci) of the infrastructure costs expended; and a list of the lots charged to Maybank and the amount owing to Maybank in respect of each lot; and (iii) to repair all damaged roads at the site, and give particularised details of maintenance costs before delivery to the local authority and whether the maintenance fees paid by the purchasers is sufficient to bear the maintenance costs.

[23] PKNS also prohibited Sazean from signing any sales and purchase agreements or in any manner whatsoever sell any of the completed units. Clause 2.4 of the stop work order is reproduced below:

> 2.4 Berkuat-kuasa serta-merta, pihak Tuan adalah dilarang daripada memasuki atau menandatangani apa-apa Perjanjian Jual Beli atau dalam apa cara sekalipun, **menjual mana-mana unit yang telah disiap dibina** kepada mana-mana pihak. (emphasis added)

The SPAs

[24] The plaintiffs had entered into SPAs as "purchaser" and Sazean as "vendor" and PKNS as "proprietor" for the purchase of the double-storey bungalows in Phase 2 of Anjung Sari.

[25] The SPAs are in the standard form in Schedule G of the HDR 1989. Under cl. 22 of the SPAs, vacant possession of the houses purchased was to have been delivered within 24 months of the date of the SPAs.

[26] Details of the plaintiffs, the SPAs, the lots and units purchased, the purchase price, and the deposit in each of the SPAs are as in the table below:

Purchasers/ Plaintiffs	SPA Date	Land/Unit No.	Purchase Price
Lee Kong Hooi ("P1")	27.08.2013	PT No. 26142, H.S (D) 264202 Unit No. U13/30B-9	RM2,540,752.00
Ng Gaik Lih ("P2")	27.08.2013	PT No. 26141, H.S (D) 264201 Unit No. U13/30B-7	RM2,431,444.00
Chan Eng Guan ("P3") & Yee Li Fen ("P4")	Undated	PT No. 26147, H.S (D) 264207 Unit No. U13/30B-19	RM2,081,428.00
Wong Geok Eng ("P5")	Undated	PT No. 26155, H.S (D) 264215 Unit No. U13/30B-14	RM2,675,494.00

[27] The SPAs with P1 and P2 were signed by the respective plaintiffs, Sazean and PKNS. The date stamped on both SPAs was 27 August 2013.

[28] The SPAs with P3 and P4 and with P5 were signed by the respective plaintiffs and Sazean only – they were not signed by PKNS. Both the SPAs were undated – no date was stamped on either SPA. The Third Schedule of the SPAs states that 10% of the purchase price is immediately payable upon signing the SPA.

[29] Sazean's official receipt shows that P3 and P4 had paid the sum of RM140,699.96, which was the "first 10% balance payment" on 14 May 2014. Sazean's official receipt dated 23 August 2013 indicates that P3 and P4 had paid the sum of RM5,000, described as "balance payment stage 1".

[30] Sazean's official receipt (marked as "P3(b)") shows that P5 had paid the "progress payment first 10%" in the sum of RM140,699.96 on 30 May 2014. Sazean's sales proforma (marked as "P3(a)") shows that P5 paid a booking fee of RM5,000 on 30 April 2013.

Settlement Agreement

[31] Approximately a year after issuing the stop work order, PKNS and Sazean entered into a settlement agreement dated 20 June 2014 ("settlement agreement"). Under the settlement agreement, Sazean agreed, among others, to immediately vacate and surrender vacant possession of the land in

Phase 2 of Anjung Sari to PKNS. Sazean also agreed to deliver to PKNS the issue documents of title for the land, the SPAs, and the deposits collected from the purchasers of Phase 2 in the sum of RM3,879,136.32 (defined in the settlement agreement as "Phase 2 sale collection").

[32] In return, PKNS agreed in cl. 2.4 of the settlement agreement to refund the sum of RM8,453,306.22 being (i) part of the PKNS's entitlement paid earlier by Sazean to PKNS and (ii) the Phase 2 development costs minus the Phase 2 sales collection.

[33] As of the date of the settlement agreement, all the Phase 2 land was undeveloped as PKNS had more than a year earlier – in the stop work order – directed Sazean to stop work on the Phase 2 land and leave all the machines and equipment located on the land. When the stop work order was issued, Sazean had only commenced the earthworks for Phase 2 – para. 2.1 of the stop work order expressly ordered Sazean to stop the Phase 2 earthworks. Sazean had not commenced the construction of the houses in Phase 2.

[34] It is also stated in the recital of the settlement agreement that Sazean has not utilised the bridging loan in respect of Phase 2 of the development and that it will procure the bridging financier, Maybank, to release the issue documents of titles of Phase 2 to PKNS in accordance with the terms of the settlement agreement. The particulars of the issue documents of title for the lots in Phase 2 are described in Annexure B of the settlement agreement.

[35] Additionally, it is stated in the recital that, among others, as of the date of the settlement agreement:

(i) the whole of Phase 1 had been sold, and 40 units of Phase 2 had been sold;

(ii) Sazean had collected the sum of RM3,879,136.32 from the purchasers of Phase 2 (defined as "Phase 2 sale collection");

(iii) Sazean had not commenced any construction works on Phase 2 except for earthwork;

(iv) Sazean was facing late delivery claims from purchasers of Phases 1A, 1B, and 1C for an estimated amount of RM19,000,000;

(v) the total PKNS' entitlement payable to PKNS under Phase 1 is RM31,898,000, of which RM14,488,977.69 had been paid;

(vi) the total PKNS' entitlement outstanding and payable by Sazean is RM22,888,339.95 ("outstanding PKNS' entitlement");

(vii) Sazean owed PKNS the estimated sum of RM6,692,609.64 for the joint infrastructure works under the technical agreement for shared infrastructural works dated 26 November 2007 ("joint infrastructure costs"); and

(viii) Sazean had expended the sum of RM6,853,124.90 for the partial development works of Phase 2 ("Phase 2 development works").

[36] Pursuant to cl. 2.2 of the settlement agreement, PKNS agreed to waive the outstanding PKNS' entitlement and the joint infrastructure costs, and subject to Sazean's compliance of the terms and conditions of the settlement agreement, PKNS will have no further claims in respect of the same.

[37] Sazean agreed under cl. 2.1 of the settlement agreement, to surrender Phase 2 of the Anjung Sari land to PKNS in accordance with the terms and conditions of the settlement agreement.

[38] In surrendering Phase 2 to PKNS, Sazean agreed upon the execution of the settlement agreement:

(i) to immediately vacate and surrender vacant possession of Phase 2 to PKNS: cl. 3.3; and

(ii) to immediately proceed to obtain and/or procure the bridging financier, Maybank, to release the issue documents of titles of Phase 2 to PKNS not later than two weeks from the date of the settlement agreement: cl. 2.5.(i).

[39] Additionally, pursuant to cl. 3.1 of the settlement agreement, Sazean agreed to proceed to obtain the issue document of titles of the Phase 2 land from Maybank within two weeks from the date of the agreement.

[40] Sazean further agreed under cl. 3.4 of the settlement agreement, not later than seven days upon written request from PKNS, to execute or procure the execution of any forms and/or documents for the purpose of PKNS taking over the development of Phase 2. The documents include but are not limited to novation agreements for the SPAs, any other agreements which PKNS may deem suitable, and the change in the operation of the developer's accounts under HDA 1966 ("HDA accounts") (if requested by PKNS). Clause 3.4 of the settlement agreement reads:

> The Company, shall not later than seven (7) days upon receipt of written request from PKNS, execute or procure the execution of any forms and/or documents for the purpose of PKNS taking over the Development of Phase 2, including but not limited to the novation agreements for the Sale and Purchase Agreement, any other agreement which PKNS may deem suitable and the change in the operation of HDA Accounts (if so requested by PKNS).

[41] Notwithstanding cl. 3.4 of the settlement agreement, PKNS has not asked Sazean to novate the SPAs to it or to change the operation of the HDA accounts. This is one of the several reasons why PKNS contends that it is not obliged to develop Phase 2 of Anjung Sari after it had taken vacant possession of the land, the issue documents of title, the SPAs, and the deposits paid by the purchasers of the houses in Phase 2 of Anjung Sari.

PKNS' Offers To Terminate The SPAs

[42] PKNS, after taking over Phase 2 of the Anjung Sari land and the deposits paid by the purchasers, decided not to proceed with the development of Phase 2 of Anjung Sari: PKNS did not construct the houses the purchasers had bought pursuant to the SPAs. Encik Suhaimi bin Kasdon ("SD6"), who was PKNS's main witness during the trial, informed this court that PKNS does not intend to develop Phase 2 of Anjung Sari, which was planned, designed, and conceptualised by Sazean pursuant to the privatisation agreement. SD6 said that PKNS may develop the land for its own project in the future.

[43] In line with PKNS' intention not to develop Phase 2 of Anjung Sari, PKNS, after taking over the land, sent to the purchasers of Phase 2 of Anjung Sari several letters, which it offered to terminate the SPAs ("offers of termination"). In the letters, PKNS informed the purchasers that it did not intend to develop Phase 2 of Anjung Sari "in the near future", and offered to refund the deposits paid in return for the purchasers signing a settlement and termination agreement (perjanjian penyelesaian dan pembatalan) prepared by PKNS' lawyers.

[44] Counsel for PKNS, Mr R Ganapathi, objected to the offers of termination from being admitted as evidence during the trial of this suit. He argued the letters were headed with the words "Tanpa Prejudis" (without prejudice) and were therefore inadmissible as evidence. After hearing the submissions of counsel for PKNS and counsel for the plaintiffs, this court ruled that the said letters are not privileged documents, and thus, are admissible as evidence. The full reasons for the ruling are detailed in section D of this judgment.

PKNS' Termination Of The Privatisation Agreement

[45] The privatisation agreement does not have an expiry date. The agreement will come to an end when PKNS terminates the agreement either under art. 18.1 or art. 18.2 of the agreement. Sazean does not have any right to terminate the agreement.

[46] "Termination date" is defined in art. 1.1 of the privatisation agreement as "the date of termination of this agreement by PKNS as provided by the terms of this agreement hereof".

[47] Under art. 18.1 of the privatisation agreement, PKNS may terminate the agreement if Sazean has committed a breach of the agreement. It may also terminate the agreement under art. 18.2 if Sazean is wound up or goes into liquidation.

[48] On 13 February 2017, PKNS issued Sazean a notis remedi (notice to remedy): it gave Sazean 60 days, from the date of the said notice to remedy the breach by completing the construction of all the houses in Phase 1C, Phase 2, and the clubhouse until the issuance of the certificate of completion and compliance ("CCC") on or before 13 April 2017.

[49] Sazean did not complete and obtain the CCC for Phase 1C, Phase 2, and the clubhouse by 13 April 2017.

[50] PKNS issued a notis kemungkiran kontrak on 25 April 2017 ("notice of breach of contract") to Sazean. However, PKNS did not exercise its right under art. 18.1 to terminate the privatisation agreement by reason of Sazean's breach.

[51] PKNS only terminated the privatisation agreement under art. 18.2 of the agreement by issuing a notice of termination on 1 November 2019 ("notice of termination") after the trial of this instant suit had commenced.

This Suit

[52] Some purchasers accepted PKNS's offers of termination and terminated their SPAs. But the plaintiffs did not. They have, instead, brought this writ action against Sazean and PKNS seeking various declaratory orders; specific performance of the SPAs, or damages *in lieu*; and payments of liquidated damages for late delivery.

[53] In their statement of claim, the plaintiffs prayed for everything but the proverbial kitchen sink. In para. 84(a) to (ww) of their statement of claim, the plaintiffs sought more than 60 reliefs against Sazean and/or PKNS. They prayed for numerous declarations; for various orders, including specific performance of the SPAs, liquidated damages for late delivery of the houses; general damages, special damages, and exemplary damages for breach of contract, negligence, the tort of conspiracy, the tort of misrepresentation and the tort of conversion and detinue; and damages for economic loss to be assessed by this court.

[54] Nonetheless, from the plaintiffs' witness statements and their counsel's submissions post-trial, it is clear what the plaintiffs primarily want is an order of specific performance of the SPAs and payment of liquidated damages – for Sazean and/or PKNS to complete the construction of the houses at Phase 2 of Anjung Sari and pay the liquidated damages for late delivery of the houses.

Sazean's Defence

[55] Sazean denies that it had breached the SPAs. Sazean's case is that it had been "robbed" by PKNS of the opportunity to proceed with the development of Phase 2 of Anjung Sari by PKNS's order for it to stop work and to vacate the Phase 2 land under the stop work order, and by PKNS

taking over the Phase 2 land under the settlement agreement. Sazean's case is that after PKNS had taken possession of the Phase 2 land, it was impossible for Sazean to build the houses. As submitted by its counsel, Mr S Ravichandran, "one cannot build castles in the air". A

[56] Mr Ravichandran further submits that the SPA is a tripartite agreement between the plaintiffs, Sazean and PKNS, and that PKNS's "attempt to shift exclusive liability on the first defendant (Sazean) is thus misconceived and baseless given the plain reading of cl. 7 of the SPA." Mr Ravichandran states that PKNS's "attempt to renege its obligations is contrary to the privatisation agreement dated 26 November 2007 and in particular cl. 16.2 (of the privatisation agreement)". Under art. 16.2(i) of the privatisation agreement, PKNS agreed that it shall, upon receipt of written request by Sazean, enter into sales and purchase agreements with the purchasers and Sazean. And under art. 16.2(ii), PKNS agreed to abide and/or comply with the HDA 1966, in particular regs. 5(5)(a), 10, and 11 of the HDR 1989 "or any relevant enactment and by-law" to enable Sazean to fulfil its obligations under the privatisation agreement. The dispute between Sazean and PKNS is currently subject to arbitration and is not a matter for determination in this instant suit. B C D

PKNS's Defence

[57] PKNS's case is that the plaintiffs' claims against it are untenable and misconceived because it had signed the SPAs with P1 and P2 as a landowner, and not as a developer. As for the SPAs with P3, P4, and P5, PKNS contends that there is no privity of contract and no nexus between it and P3, P4, and P5 because it did not sign the SPAs with P3, P4, and P5. E F

[58] PKNS contends that for these reasons, it cannot at law be forced to take over and continue the development of Phase 2 of Anjung Sari because Sazean had agreed to undertake the development of Anjung Sari on an "as is where is" basis under the privatisation agreement, and the only warranty that PKNS gave is that it is the registered and beneficial owner of the land. G

[59] PKNS further contends that it cannot be compelled to carry out Sazean's responsibilities and obligations under the SPAs because it did not enter into a novation or assignment agreement or supplementary sales and purchase agreement with the plaintiffs. PKNS says that the settlement agreement does not in any way impose any obligation on it as the landowner to take over the development of Phase 2 of Anjung Sari. It maintains that the plaintiffs cannot, in law, compel or force it to execute any novation agreement with Sazean. H

[60] Additionally, PKNS argues there was never any contract between PKNS and the plaintiffs, for PKNS to develop the Phase 2 land since there was no offer, acceptance, and intention to create a legal relationship between I

PKNS and the plaintiffs for PKNS to develop the Phase 2 land. Also, PKNS, in its offers of termination of the SPAs, had informed the plaintiffs that it did not intend to develop the Phase 2 land.

[61] PKNS' case is that Sazean is solely responsible for the non-construction of the houses sold to the plaintiffs in Phase 2 of Anjung Sari for the following reasons:

(i) Sazean had failed to undertake the development of Phase 2 of Anjung Sari and had voluntarily surrendered the Phase 2 land to PKNS;

(ii) Sazean alone did the promotion and launching of Phase 2 of Anjung Sari;

(iii) Maybank had not approved the bridging loan for the construction of Phase 2 of Anjung Sari when the parties entered the SPAs;

(iv) PKNS had issued the stop work order prohibiting Sazean from selling the houses in Phase 2;

(v) Sazean had issued a letter of indemnity dated 5 September 2014 when it surrendered to PKNS the 40 SPAs that it had signed with the purchasers of Phase 2 of Anjung Sari, where it agreed to indemnify PKNS against any claims made by any of the purchasers arising from the payment of the purchase price under the SPAs; and

(vi) PKNS had not agreed to take over the development of Phase 2 of Anjung Sari.

[62] PKNS further and/or in the alternative submitted that it is not capable of taking over the Anjung Sari project from Sazean because:

(i) the housing developer's license and advertisement permit issued by the authorities under the HDA 1966 was for Sazean to develop and market the units as a developer of the project;

(ii) Sazean did not apply for the assignment of Phase 2 of Anjung Sari project to Sazean under s. 8 of the HDA 1966;

(iii) there was no approval by the Controller of Housing for PKNS to take over the development of the Anjung Sari project and continue with Phase 2 of Anjung Sari pursuant to s. 8 of the HDA 1966; and

(iv) there was no directive issued by the Minister under s. 11(1)(c) of the HDA 1966 for PKNS to continue and complete the project.

[63] PKNS contends that the SPAs are frustrated – it claimed that the SPAs were impossible to perform at the time they were entered into. Counsel for PKNS submitted that for this reason, pursuant to s. 57(3) of the Contracts Act 1950, any compensation payable to the plaintiffs should be paid by the Sazean and not PKNS.

Issues For Determination

[64] The primary issue for determination in this suit is what is the plaintiffs' recourse under the SPAs against the developer and/or landowner, where the landowner – who had taken from the developer possession of the land for development and the deposits paid by the purchasers – refuses to proceed with the development of the houses purchased under the SPAs. Is PKNS *qua* landowner, after having taken over the land to be developed and the deposits paid by the plaintiffs, obliged under the SPAs, the HDA 1966, and the HDR 1989 to construct the Phase 2 of Anjung Sari houses and deliver them to the plaintiffs?

[65] Unfortunately, the plaintiffs, instead of focusing on this primary issue, filed 15 different issues to be tried in two separate enclosures: (i) issues between the plaintiffs and Sazean (encl. 71); and (ii) issues between the plaintiffs and PKNS (encl. 72). The issues to be tried in encls. 71 and 72 are identical: they are (translated from the original Bahasa Malaysia into English) as follows:

1) Did D2 act voluntarily to become the developer of Anjung Sari Phase 2, replacing D1, when it entered into the Settlement Agreement with D1?

2) Does D2 have a statutory responsibility under sections 11 and 12 of Enakmen Perbadanan Kemajuan Negeri Selangor tahun 1994 to build and complete the houses that were purchased by the plaintiffs?

3) If yes, did D2 breach their statutory responsibility under sections 11 and 12 of Enakmen Perbadanan Kemajuan Negeri Selangor tahun 1994 when they chose to refuse to build the houses that were sold to the plaintiffs in Anjung Sari Phase 2?

4) Do the defendants have a statutory obligation under section 7(j) of the Housing Development (Control and Licensing) Act 1966 (Act 118) to complete the houses that were purchased by the plaintiffs pursuant to the SPAs?

5) Do the defendants have an obligation to enter into a Novation Agreement for all the SPAs with the plaintiffs?

6) Did D1 and D2 obtain the permission of the Jabatan Perumahan Negara to give effect to the Settlement Agreement?

7) Did the defendants commit a tort of conspiracy towards the plaintiffs with the intention to cause economic loss to the plaintiffs?

8) Did the defendants commit negligence and misrepresentation and fraudulent misrepresentation/menyeleweng causing the tort of economic loss towards the plaintiffs?

9) Did the defendants commit fraudulent misrepresentation, deviation of facts (penyelewengan fakta) and false representation towards the plaintiffs?

10) Did D2 purposely or negligently or by omission failed/ignored (abai) to carry out its obligations as the registered landowner to take all steps and actions required to make the Privatisation Agreement a success in accordance with clause 2.1 of the Privatisation Agreement?

11) Whether D2 had purposely failed to ensure the construction and completion of the houses on the lots owned by the plaintiffs even though it has entered into the Settlement Agreement and had taken vacant possession of Phase 2 from D1?

12) Did D1 and D2 wrongfully encourage and persuade and invite, and gave a fraudulent representation when they sold the houses to the plaintiffs without informing that actually the Privatisation Agreement was not extended after it had expired on 27.11.2012?

13) Whether the Privatisation Agreement which had expired on 27.11.2012 was rescued (diselamatkan) by the Settlement Agreement?

14) Whether the "Without Prejudice" letters of offer dated 07.09.2015, 16.12.2015, 18.04.2016 and 05.12.2016 sent to the plaintiffs was an attempt to deviate the facts (menyeleweng fakta) and give false information with the intent to cause loss to the plaintiffs for them to voluntarily terminate the SPAs by stating that D1 failed to complete the houses with the stipulated time?

15) Whether the plaintiffs are entitled to the reliefs claimed in (a) to (ww) in the Statement of Claim?

[66] Not only are many of the issues in encls. 71 and 72 irrelevant to the primary issue of who is legally obliged to construct the houses purchased by the plaintiffs in Phase 2 of Anjung Sari, but they are premised on the wrong facts and statute.

[67] For the reasons discussed in issue (i) of this judgment, the privatisation agreement had not expired when PKNS issued the stop work order on 8 May 2013 and when Sazean and PKNS entered into the settlement agreement on 20 June 2014.

[68] Additionally, there is no Selangor State enactment known as Enakmen Perbadanan Kemajuan Negeri Selangor tahun 1994, making it impossible for this court to make a finding on issues (2) and (3) in encls. 71 and 72. If the year in the enactment stated in the issues to be tried was a typo – that it should have been "1964" and not "1994". However, even if the statute was stated correctly, s. 11 of the PKNS Enactment 1964 governs the quorum of PKNS' meetings, and s. 12 governs the conflict of interest of members of PKNS. How are statutory provisions on PKNS' quorum for meetings and conflict of interest relevant to the dispute in this instant suit?

[69] This court tried to get the parties to narrow the issues in encls. 71 and 72. However, learned counsel for the plaintiffs, in a letter dated 13 January 2023 (encl. 191), informed this court that they had not received any proposed reduced issues to be tried from Sazean and that they could not accept the reduced issues to be tried proposed by PKNS.

[70] Notwithstanding the numerous issues to be tried and causes of action pleaded by the plaintiffs, essentially, the issues for this court's determination are whether the SPAs are concluded and enforceable contracts between the plaintiffs with Sazean and PKNS; whether the SPAs are capable of performance; and if yes, what is the plaintiffs' recourse against Sazean and/or PKNS. To arrive at the answers to these questions, this court must make a finding on the following issues:

(i) had the privatisation agreement expired when Sazean and PKNS entered into the settlement agreement and when they entered into the SPAs with the plaintiffs?

(ii) is PKNS a party to the SPAs?

(iii) is there a privity of contract between the plaintiffs and PKNS under the SPAs?

(iv) are the SPAs capable of performance? Are the SPAs frustrated?

(v) is Sazean and/or PKNS obliged to construct and deliver vacant possession of the houses in Phase 2 of Anjung Sari?

(vi) what is the plaintiffs' recourse against Sazean and/or PKNS? Can this court award specific performance of the SPAs?

Ruling On PKNS' Offers To Terminate The SPAs

[71] As stated in the introduction section above, this court ruled during the trial that PKNS' offers to terminate the SPAs are admissible as evidence in this suit. The full reasons for the ruling are detailed in this section.

[72] PKNS, after it took over the Phase 2 land and the deposits from Sazean, offered the purchasers of Phase 2 of Anjung Sari – including the plaintiffs – to return the deposits they had paid under the SPAs in exchange for the purchasers terminating the SPAs.

[73] PKNS, through letters dated 7 September 2015 to P1 and P2, offered both plaintiffs to terminate the SPAs ("first offer of termination") and to return the deposits they had paid together 10% interest from the date of receipt of the deposit until 31 May 2015. The plaintiffs were asked to execute a settlement and termination agreement (perjanjian penyelesaian dan pembatalan) prepared by PKNS' lawyers.

[74] In the first offer of termination to P1, PKNS stated that based on Sazean's physical performance, it would be impossible for the project to be completed within the time stipulated in the SPAs signed by P1 and that PKNS, as the landowner, had decided to repossess the Phase 2 land to avoid the project from being abandoned and cause a bigger problem for the purchasers. PKNS further stated that it does not intend to develop the land in the near future, and that priority will be given to P1 to purchase the property (hartanah) to be developed by PKNS in the near future. PKNS went on to say that, however, to protect the interest of the purchasers who have paid monies to the developer and with P1's agreement to terminate the SPA, PKNS offered P1 to return his deposit together with 10% interest.

[75] Paragraphs 2 to 6 of the first offer of termination reads:

> 2. Adalah dimaklumkan bahawa, PKNS telah meneliti dan mengkaji prestasi kemajuan Pembangunan fizikal yang dijalankan oleh Sazean Development Sdn Bhd. selaku pemaju bagi Projek Anjung Sari dan mendapati adalah mustahil bagi projek tersebut untuk disiapkan mengikut jangkamasa yang telah ditetapkan di bawah perjanjian jual beli yang ditandatangani oleh pihak tuan.
>
> 3. Oleh yang demikian, PKNS selaku tuan tanah telah membuat Keputusan untuk mengambil semula tanah Fasa 2 tersebut bagi mengelakan projek tersebut dari terbengkalai serta menimbulkan masalah yang lebih besar kepada pembeli-pembeli.
>
> 4. Untuk makluman tuan juga, PKNS tidak bercadang untuk memajukan tanah tersebut dalam masa terdekat ini. Keutamaan akan diberikan kepada pihak tuan untuk membeli hartanah yang akan dimajukan oleh PKNS pada masa akan datang.
>
> 5. Walau bagaimanapun, bagi menjaga kepentingan pembeli-pembeli yang telah membayar sejumlah wang kepada pemaju dan di atas persetujuan pihak tuan untuk membatalkan perjanjian jual beli yang telah ditandatangani, pihak kami dengan ini menawarkan tawaran seperti berikut:

Bil	Perkara	Jumlah Bayaran
i)	Memulangkan kembali wang deposit/ pendahuluan yang telah dibayar kepada pemaju	RM101,630.88
ii)	Faedah sebanyak 10% setahun yang dikira ke atas jumlah wang seperti (i) di atas dari tarikh terima bayaran sehingga 31 Mei 2015	RM49,088.72
	Jumlah keseluruhan	**RM150,718.80**

6. Sehubungan dengan itu, pihak tuan adalah diminta untuk menandatangani Perjanjian Penyelesaian dan Pembatalan yang disediakan oleh peguam PKNS yang akan berhubung dengan pihak tuan bagi urusan selanjutnya.

[76] A few months after sending P1 and P2 the first offer of termination, PKNS sent another offer of termination of the SPAs ("second offer of termination"). In this second offer of termination, PKNS offered P1, P2, P3, P4 and P5 two options: option 1 was to buy a house at the Casa Sutra development at Bandar Setia Alam at a discounted price; and option 2 was cash reimbursement of the deposit paid together with 10% of the purchase price of the house Phase 2 of Anjung Sari house purchased.

[77] PKNS then sent the plaintiffs two further offers of termination of the SPAs ("third offer of termination" and "fourth offer of termination"). Details of the offers of termination from PKNS to the plaintiffs are as below:

Plaintiffs	1st Offer of Termination	2nd Offer of Termination	3rd Offer of Termination	4th Offer of Termination
P1	07.09.2015	16.12.2015	18.04.2016	05.12.2016
P2	07.09.2015	16.12.2015	18.04.2016	05.12.2016
P3 & P4		16.12.2015	20.04.2016	05.12.2016
P5		16.12.2015	20.04.2016	05.12.2016

[78] The offers of termination were written in "Tanpa Prejudis" (without prejudice) letters from PKNS to the plaintiffs on the dates detailed in the table in para. [76] above. Counsel for PKNS, Mr R Ganapathi, submitted that PKNS had issued the offers of termination not just to the plaintiffs but to all the 40 purchasers who had signed the sales and purchase agreements for Phase 2 of Anjung Sari.

[79] Mr Ganapathi argued that because these offers of termination were in letters headed with the words "Tanpa Prejudis", they were privileged and are, therefore, inadmissible as evidence in this suit. Whereas counsel for the plaintiffs, Encik Mohaji Selamat, submitted that there is no privilege attached to these offers of termination because at the time they were sent by PKNS to the plaintiffs, there was no dispute between the plaintiffs and PKNS.

[80] Notwithstanding its contention that the offers of termination are privileged documents and are inadmissible as evidence, PKNS pleaded in its amended defence that it had made "*ex gratia*" offers on a "without prejudice" basis to P1 and P2.

[81] In deciding whether the offers of termination are admissible or not as evidence during the trial of this suit, this court considered the law on (i) privileged documents; and (ii) privilege attached to "without prejudice" documents.

(i) Legal Professional Privilege v. Litigation Privilege

[82] There are two types of privilege: legal professional privilege and litigation privilege.

[83] Legal professional privilege is codified under ss. 126 to 129 of the Evidence Act 1950 – it covers communications between lawyers and their clients.

[84] Whereas litigation privilege covers all documents brought into being for the purposes of litigation: see *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2016] 10 CLJ 164; [2016] 5 MLJ 127; [2016] 4 AMR 345 ("*Bukit Lenang Development*").

[85] The High Court in *Government Of The State Of Selangor v. Central Lorry Service & Construction Ltd* [1971] CLJU 36; [1971] 1 LNS 36; [1972] 1 MLJ 102 per Mohamed Azmi J (as he then was) recognised that legal professional privilege codified in the Evidence Act 1950 is not litigation privilege.

[86] The Court of Appeal in *Bukit Lenang Development* held that legal professional privilege is not litigation privilege. Vernon Ong JCA (as he then was), delivering the judgment of the Court of Appeal, said:

> [31] … Section 126 is the only section that deals with privilege of the kind relied on by the appellant – legal professional privilege. **In our view the privilege codified by s. 126 of the Evidence Act 1950 is not litigation privilege.** (emphasis added)

[87] Mr Ganapathi in his submissions, did not state which privilege PKNS was relying on – legal professional privilege or litigation privilege. He simply said that the offers of termination are inadmissible as evidence because they were in "without prejudice" letters.

[88] Is legal professional privilege attached to the offers of termination? PKNS wrote the letters containing the offers of termination to the purchasers of Phase 2 of Anjung Sari: they were not written by PKNS' lawyers to PKNS. Therefore, legal professional privilege is not attached to the said offers of termination.

[89] The next question is whether litigation privilege is attached to the offers of termination. It depends on whether the offers of termination were – per the Court of Appeal in *Bukit Lenang Development* – "brought into being for purposes of litigation".

[90] The facts show that the offers of termination were not brought into being for the purposes of litigation. At the time the offers of termination were sent by PKNS to the purchasers, there was no dispute between PKNS and the plaintiffs. The letters were sent by PKNS "bagi menjaga kepentingan pembeli-pembeli yang telah membayar sejumlah wang kepada pemaju": see para. 5 of the first offer of termination reproduced in para. [75] above.

[91] As there was no dispute between PKNS and the plaintiffs at the time the letters of offers of termination were sent to the plaintiffs, it follows, therefore, that there was no litigation privilege attached to the offers of termination.

(ii) "Without Prejudice" Documents

[92] It is a general rule of law that in a dispute, documents written "without prejudice" are inadmissible as evidence of negotiations attempted between the parties to the dispute. This is "in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached": see *Malayan Banking Bhd v. Foo See Moi* [1981] CLJU 95; [1981] 1 LNS 95; [1981] 2 MLJ 17.

[93] Nonetheless, just because a document is headed "without prejudice" does not automatically make it a privileged document that is inadmissible as evidence in court. The law is settled that in order for "without prejudice" documents to be privileged documents and inadmissible as evidence during this trial, the party claiming that the documents are privileged must prove:

(i) there was a dispute between the parties at the time the letters were sent to the recipient of the letters; and

(ii) the letters must evidence negotiations attempted between the disputing parties.

[94] In this instant case, at the time when PKNS sent the offers of termination to the plaintiffs, there was no dispute between PKNS and the plaintiffs. Moreover, the offers of termination did not provide evidence of any negotiations between PKNS and the purchasers — they were one-sided letters written by PKNS to the purchasers of Phase 2 of Anjung Sari, offering to return their deposit in return for them agreeing to terminate the SPAs.

[95] Accordingly, for these reasons, this court ruled that there was no privilege attached to the offers of termination and they were, therefore, admissible as evidence during the trial of this suit.

Analysis And Findings Of This Court

Issue (i): Had The Privatisation Agreement Expired When Sazean And PKNS Entered Into The Settlement Agreement And When They Entered Into The SPAs With The Plaintiffs?

[96] The question for this court's determination in issue (i) is whether the privatisation agreement had expired when Sazean and PKNS entered the settlement agreement, and when they entered the SPAs with the plaintiffs.

[97] It is an established legal principle that the construction of a contract is a question of law and not of fact: see *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101; [2005] 5 AMR

24. The Federal Court in *Far East Holding Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 reiterated that the construction of the contract is a question of law.

[98] When construing a contract, this court (i) must construe the contract as a whole in order to ascertain the true meaning of its clauses, (ii) as far as practicable effect must be given to every clause, and (iii) each clause must be brought into harmony with the other clauses in the contract. The Federal Court in *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689; [2016] 3 AMR 101 ("*Lucy Wong*") held:

> [34] … *it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract.* (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 and *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294; [2003] 4 MLJ 357). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. (emphasis added)

[99] Azahar Mohamed FCJ (as he then was) delivering the majority judgment of the Federal Court in *Wong Yee Boon v. Gainvest Builders (M) Sdn Bhd* [2020] 2 CLJ 727; [2020] 3 MLJ 571; [2020] 1 AMR 761 reiterated the principles of contractual interpretation set out earlier in the *Lucy Wong* case. His Lordship said:

> [8] As a starting point, it is important to bear in mind the basic principle of construction of contracts. *The basic rule is that effect must be given to the intention of the parties*. This requires an objective test and not a subjective approach. It is an objective approach which is required and a solution should be found which is both reasonable and realistic (see *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 592). *The intention must be sought from the document itself. To ascertain the intention of the parties, the court reads the terms of the contract as whole, giving the words used their natural and ordinary meaning.* We have explained this basic principle in the case of *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 AMR 101 … (emphasis added)

[100] Accordingly, in determining whether the privatisation agreement had expired when PKNS and Sazean had entered into the settlement agreement and when they entered into the SPAs with the plaintiffs, this court must read the terms of the privatisation agreement and the settlement agreement as a whole, and give the words used in both agreements their natural and ordinary meaning.

[101] PKNS and Sazean entered into the privatisation agreement to develop the land for the Anjung Sari housing development. They agreed to "co-operate and assist each other and do all such acts and things as may be necessary so that full effect may be given to the completion of the development works planned" under the privatisation agreement and/or the technical agreement for shared infrastructural works: see art. 2 objects of the privatisation. "Development works" is defined as follows in art. 1.1 of the privatisation agreement:

Development Works	the implementation, construction and completion of all works in connection with the Development (including the Infrastructure Works, the Landscaping Works and the Shared Infrastructural Works) necessary or appropriate for the Development in accordance with the Approved Plans and the provisions of this Agreement;

[102] Both parties had entered into the settlement agreement to resolve the development of Phase 1 of Anjung Sari, to settle PKNS' entitlement and for Sazean to surrender the undeveloped land in Phase 2. Recital Q of the settlement agreement states:

> Q. The Parties hereby agree to enter into this Settlement Agreement to mutually resolve the completion of the Phase 1 development, the settlement of PKNS Entitlement and the surrender of the remaining undeveloped land in Phase 2 in accordance with the terms and conditions set out herein.

[103] The "completion date for development" under the privatisation agreement is five years from the date of the agreement. Clause 1.1 of the privatisation agreement reads:

Completion Date for Development	Completion Date for the Development of the Land shall be FIVE (5) years commencing from the date of this Agreement;

[104] The privatisation agreement provides for the extension and further extension periods of the completion date for development: see the definition of "extension period of completion date" defined in art. 1.1 of the privatisation agreement reproduced in para. [19] above.

[105] Sazean, for purposes of developing the land for the Anjung Sari housing project, had divided the land in several phases – Phases 1A, 1B and 1C (collectively referred to as "Phase 1") and Phase 2.

[106] Sazean (for various reasons that are currently the subject matter of the arbitration between Sazean and PKNS) failed to complete the development of Phase 1 and Phase 2 by the expiry of the "completion date for development", *ie*, by 26 November 2012 (*ie*, five years from the date of the privatisation agreement).

[107] Under art. 5.1.2 of the privatisation agreement, if Sazean fails to complete the development within the completion date for development, it must pay to PKNS the entire balance of PKNS' entitlement as at the completion date for development. And if Sazean does not make the payment, it must pay interest at the rate of 10% per annum on the entire outstanding balance of the PKNS' entitlement from the expiry of the completion date for development until payment of the entire balance. Article 5.1.2 reads:

> 5.1.2 Without prejudice to PKNS' right to receive payment under Article 5.1.1 above, it is further agreed by the Company that *if the Company fails to complete the Development within the Completion Date for Development, the Company shall first pay the entire balance of PKNS' Entitlement outstanding as at the Completion Date for Development before it could resume completion of the Development failing which the Company shall pay interest on such entire balance due from the date of such failure to the date of actual payment on such entire balance* (including after judgment (at the rate of Ten per centum (10%) per annum and such interest shall be payable on demand. (emphasis added)

[108] Pursuant to art. 5.1.3 of the agreement, the veracity of the whole of the PKNS' entitlement is subject to the final sales revenue account, whether the sales revenue was secured during the "completion date for development" or the "extension period of completion date". Article 5.1.3 reads:

> The veracity of the whole PKNS' Entitlement under this Agreement shall be subject to the final sales revenue accounts of the phases of the Development to be submitted by the Company for PKNS' approval whether the sales revenue shall be secured during the Completion Date for Development or the Extension Period of Completion Date, as the case may be.

[109] It is clear from the definition of "extension period of completion date", and the provisions in arts. 5.1.2 and 5.1.3 that the "completion date for development" may be extended for Sazean to complete the development and that it must pay the entire balance of PKNS' entitlement outstanding as at the "completion date for development" before it can resume completion of the development. Otherwise, Sazean would have to pay interest at the rate of 10% per annum for the outstanding balance.

[110] Thus, it is evident from the express terms of the privatisation agreement that it was the "completion date for development" that had expired five years after the date of the privatisation agreement. It was not the privatisation agreement that had expired. In fact, recital P of the settlement agreement states that it is the "completion date for development" under the privatisation agreement and PKNS has not agreed to extend it. Recital P reads:

> The Completion Date for Development under the Privatisation Agreement has expired and PKNS has not agreed to extend the same.

[111] Moreover, there is no express provision in the privatisation agreement for the expiry of the agreement. The privatisation agreement does not expire – it can only be ended by way of termination by PKNS. Sazean does not have any right to terminate the agreement.

[112] The privatisation agreement can be terminated by PKNS under arts. 18.1 and 18.2 of the agreement. Articles 18.1 and 18.2 of the agreement states:

Article 18

Termination

18.1 Defaults By The Company

If the Company Is in breach of any of Its obligations under this Agreement including but not limited to the following:-

(a) if it fails without reasonable excuse as determined after due process of the provisions of Article 21 of this Agreement mobilise and execute the Development of Land as stipulated under Article 4.1 hereof and/or to proceed regularly and diligently with the Development Works; or

(b) if it suspends without reasonable excuse as determined after due process of the provisions of Article 21 of this Agreement the construction of the Development Works or any uncompleted part thereof; or

(c) it fails to pay the consideration payment (PKNS' Entitlement) to PKNS within the period or manner specified in Article 5 of this Agreement; or

(d) has committed a fundamental breach of any of Its obligations under this Agreement and/or the Technical Agreement for Shared Infrastructural Works and the Company shall be deemed to have committed a fundamental breach of this Agreement and/or the Technical Agreement for Shared Infrastructural Works if the breach of the relevant obligations of the Company hereunder and thereunder is serious enough to give rise to a right to treat this Agreement as terminated,

then *PKNS may, except for (c) above, without prejudice to any other rights or remedies which PKNS may have against the Company give notice to the Company specifying the relevant breach and requiring the Company to remedy that breach within a period of sixty (60) days after the date of such notice failing which PKNS may thereupon terminate this Agreement.* In the event of (c) above PKNS may give fourteen (14) days' notice requiring the Company to remedy the breach failing which PKNS may thereupon terminate this Agreement.

18.2 Liquidation And Insolvency

If the Company:

(a) has a winding up order made against it; or

(b) goes into liquidation whether compulsory or voluntary (except for the purpose of reconstruction, amalgamation or other similar purpose not involving the realisation of assets) or becomes insolvent or compounds with or makes similar arrangement with its creditors or does any act frustrating ability to perform obligations under this Agreement,

then *PKNS may, without prejudice to Its other rights and remedies under this Agreement, terminate this Agreement at any time thereafter by giving notice to that effect to the Company.* (emphasis added)

[113] After Sazean failed to complete the development of Anjung Sari at the expiry of the 'completion date for development", PKNS issued a notice to remedy on 13 February 2017, pursuant to art. 18.1 of the privatisation agreement. In the notice to remedy, PKNS gave Sazean 60 days from the date of the notice to remedy the breach by completing the construction of all the houses in Phase 1C, Phase 2, and the clubhouse until the issuance of the CCC on or before 13 April 2017. Paragraph 6 of the notice of remedy is reproduced below:

Surat Kami: 38 PKNS/BK/16/86/08/Jld. 13
Tarikh: 13 Februari 2017

Sazean Development Sdn Bhd
(U.P. Tan Sri Abdul Kadir Bin Hj Sheikh Fadzir)

Yang Berbahagia Tan Sri,

Projek Penswastaan Di Antara PKNS Dan Sazean Development Sdn Bhd Di Atas Tanh Milik PKNS Seluas 50.3 Ekar Di Alam Nusantara, Bandar Setia Alam

Perlanggaran Perjanjian Penswastaan Dan Perjanjian Penyelesaian – Notis Remedi

…

6. PKNS memandang serius kegagalan pihak Sazean untuk menyempurnakan obligasi-obligasi di bawah Perjanjian Penyelesaian dan/atau Perjanjian Penswastaan dan *selaras dengan peruntukan Perjanjian Penswastaan, PKNS disini memberikan Notis 60 hari dari tarikh surat ini di bawah peruntukan Klausa 18.1 Perjanjian Penswastaan tersebut untuk meremedikan perlanggaran dengan menyempurnakan pembinaan kesemua rumah dibawah Fasa 1C, Fasa 2 dan Rumah Kelab (Club House) sehingga mendapat kelulusan CCC pada atau sebelum 13hb April 2017.*

Sekian, terima kasih

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah

t.t.
(Hajah Siti Zubaidah binti Haji Abdul Jabar)
Ketua Pegawai Korporat
b.p. Ketua Pegawai Eksekutif
Perbadanan Kemajuan Negeri Selangor (emphasis added)

[114] Sazean failed to remedy the breach by or before 13 April 2017. PKNS issued a notice of breach of contract on 25 April 2017 to Sazean. However, PKNS did not terminate the privatisation agreement even though it has the right to do so under art. 18.1 of the agreement. A

[115] PKNS only terminated the privatisation agreement under art. 18.2 pursuant to the notice of termination issued on 1 November 2019, after the trial of this suit had commenced before Che Mohd Ruzima bin Ghazali J (as he then was). B

[116] Furthermore, cl. 6.2 of the settlement agreement expressly states that the settlement agreement is supplemental to the privatisation agreement and that both agreements shall be read together. Also, any variation shall not in any way whatsoever be construed as a derogation of any provision in the privatisation agreement, which remains in full force and effect. Clause 6.2 of the settlement agreement reads: C

> *This Settlement Agreement shall be read together with the Privatisation Agreement and is supplemental to the Privatisation Agreement effective from the date of this Settlement Agreement.* Any variation shall not in any way whatsoever be construed as derogation of any other article, clause or provision in the Privatisation Agreement and they shall remain in full force and effect, nor shall any rights, liabilities and obligations of the Parties to the Privatisation Agreement therein contained be in any way whatsoever affected or impaired by this Settlement Agreement, save and except for what has been expressly herein provided. (emphasis added) D E

[117] Additionally, cl. 6.5 of the settlement agreement states that the settlement agreement shall not "prejudice, affect, impair, discharge or diminish the legality, validity and effectiveness of the privatisation agreement", and the parties shall continue to perform or cause to be performed all their obligations under the privatisation agreement (subject to the amendments in the settlement agreement). Clause 6.5 reads: F

> Nothing in this Settlement Agreement shall prejudice, affect, impair, discharge or diminish the legality, validity and effectiveness of the Privatisation Agreement (subject only to the variation herein provided) and **the Parties shall continue to perform or cause to be performed all their obligations thereunder (subject to the amendments herein provided)**. (emphasis added) G

[118] Clause 6.3 of the settlement agreement stipulates that any reference to the privatisation agreement in any documents entered by the parties (*ie*, Sazean and PKNS) or in connection with the development shall be construed as a reference to the privatisation agreement, as so varied by the settlement agreement. Clause 6.3 reads: H

> Any reference to the Privatisation Agreement in any document entered into by the Parties or otherwise in connection with the Development shall hereafter be construed as a reference to the Privatisation Agreement as the case may be, as so varied by this Settlement Agreement. I

[119] For the purposes of interpretation of the settlement agreement, cl. 6.4 of the settlement agreement states that in the event of inconsistency between the provision of the agreement and the privatisation agreement, the provision in the settlement agreement prevails. Clause 6.4 reads:

> In the event of any inconsistency between a provision of this Settlement Agreement and a provision of the Privatisation Agreement, as the case may be, the provision of this Settlement Agreement shall prevail for the purpose of its interpretation.

Findings On Issue (i)

[120] Accordingly, based on the natural and ordinary meaning of the terms and provisions in the privatisation agreement, this court finds that the privatisation agreement had not expired at the time Sazean and PKNS entered into the settlement agreement. It was the "completion date for development" under the privatisation agreement that had expired on 26 November 2012.

[121] The facts show that the privatisation agreement was only terminated by PKNS on 1 November 2019.

[122] The terms and provisions of the settlement agreement expressly state that the said agreement is supplemental to the privatisation agreement; that the privatisation agreement remains in full force and effect; and that the settlement agreement does not diminish the legality, validity and effectiveness of the privatisation agreement.

[123] Notably, the settlement agreement expressly stipulates that Sazean's and PKNS' rights, liabilities, and obligations under the privatisation agreement are not in any way whatsoever affected or impaired by the settlement agreement, save and except as expressly provided in the said agreement.

[124] Therefore, this court finds that the privatisation agreement was in full force and effect as at the date of the settlement agreement on 20 June 2014 and when the plaintiffs entered into the SPAs with Sazean and PKNS in 2013 and 2014.

[125] This court further finds that Sazean and PKNS were expressly required by the settlement agreement to continue to perform or cause to be performed all their obligations under the privatisation agreement, subject to the amendments provided in the settlement agreement. These obligations include developing and completing the construction of the houses in Phase 2 of Anjung Sari housing development.

Issue (ii): Is PKNS A Party To The SPAs? Are The SPAs Concluded And Enforceable Contracts Between The Plaintiffs, Sazean And PKNS?

[126] The SPAs with P1 and P2 were signed by the respective plaintiffs, Sazean and PKNS. The date stamped on both SPAs was 27 August 2013.

[127] The SPAs with P3 and P4 and with P5 were signed by the respective plaintiffs and Sazean only – they were not signed by PKNS. Both the SPAs were undated – no date was stamped on either SPA. A

[128] PKNS' position is that it is not a party to the SPAs, and the SPAs are not concluded contracts between the plaintiffs, Sazean and PKNS for the following reasons: B

(i) PKNS had signed the SPAs with P1 and P2 as the proprietor of the land and not as the developer;

(ii) PKNS did not sign the SPAs with P3, P4, and P5;

(iii) Sazean did not novate or assign the SPAs to PKNS; C

(iv) the only warranty PKNS gave the privatisation agreement is that it is the registered and beneficial owner of the land;

(v) Sazean was prevented by the stop work order from entering into SPAs for built units (unit yang telah siap dibina); and D

(vi) the SPAs are frustrated because performance under the SPAs was impossible at the time the SPAs were entered into.

[129] PKNS does not deny signing to the SPAs with P1 and P2. But it contends that it had signed the SPAs solely in its capacity as a landowner. Counsel for PKNS argues that pursuant to the terms of the SPAs, PKNS does not have any obligation to develop the land and that the P1 and P2's claims regarding the construction and completion of the houses in Phase 2 of Anjung Sari must be addressed to Sazean. In its written submissions, PKNS focused on Sazean's obligations under the SPAs. E F

[130] As for the SPAs with P3, P4, and P5, PKNS' case is that there is no concluded contract between PKNS and P3, P4 and P5 because PKNS did not sign either of the SPAs.

[131] Mr Ganapathi submits that because PKNS did not sign the SPAs with P3, P4 and P5, there is no privity of contract and no nexus whatsoever between PKNS and P3, P4 and P5. He cites the Court of Appeal decisions in *University Of Malaya (University Malaya Medical Centre) v. FBSM Ctech Sdn Bhd* [2018] 8 CLJ 71; [2018] 5 MLJ 397 ("*University Of Malaya*") and *Trip4Asia Sdn Bhd & Anor v. Destini Bhd & Other Appeals* [2021] CLJU 1453; [2021] 1 LNS 1453; [2021] 6 MLJ 820; [2021] AMEJ 1499 ("*Trip4Asia*") as authority to support his argument. G H

[132] With respect to learned counsel for PKNS, both *University Of Malaya* and *Trip4Asia* are appeals decided on a completely different set of facts from those in this instant case. First, the contracts in the *University Of Malaya* and *Trip4Asia* are not in the statutory format prescribed by statute. Whereas the SPAs in this instant case are in the statutory format prescribed in Schedule I

G of the HDR 1989. Secondly, there are two contracts in the *University Of Malaya* and *Trip4Asia*: (i) a main contract between the employer and the main contractor, and (ii) a subcontract between the main contractor and the subcontracts. In this instant case, there is only one contract, *ie*, the SPA. The parties to each SPA are the purchaser, the developer, and the landowner, which is statutorily required under reg. 10 of the HDR 1989.

[133] The issue before the court in both *University Of Malaya* and *Trip4Asia* was whether the subcontractor who is a party to the subcontract with the main contractor has the privity of contract with the employer under the main contract between the employer and the main contractor. In both cases, the Court of Appeal held that the subcontractor does not have the privity of contract in the main contract between the main contractor and the employer.

[134] In contrast, the question before this court in this instant suit is whether there is privity of contract between PKNS and P3, P4, and P5 under the SPAs that were unsigned by PKNS.

[135] With respect to learned counsel for PKNS, the law is settled that agreements that are unsigned and/or undated may be binding between the parties. Just because an agreement is unsigned or undated does not mean there is no binding contract between the parties or that there is no privity of contract between the parties.

[136] The Federal Court in *Ajwa For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd* [2013] 7 CLJ 18; [2013] 5 MLJ 625; [2013] 4 AMR 789 ("*Ajwa*"), held that an agreement that has not been signed by either or both the parties, or an agreement that has not been dated, may be enforceable and binding between the parties. The Federal Court held that sales contracts are not subject to any condition that they are signed before coming into effect. Zulkefli Makinudin CJ (Malaya) (as he then was), delivering the judgment of the Federal Court, held:

> [22] On the question of whether the sales contracts are binding without the signature, we agree with the submission of the respondent that the sales contracts are not subject to any condition that they be signed before coming into effect. *It is common knowledge that international agreements between parties doing business from different parts of the world ranging especially in international sales of goods and charter parties are concluded and performed without the need for signatures, so long as parties have agreed on the terms. Likewise, the sales contracts setting out the agreed terms, despite the lack of signature as in the present case are valid and enforceable contracts.* On this point we would refer to the two English cases of *Baker v. Yorkshire Fire and Life Assurance Company* [1892] 1 QB 144 where it was held that it is not necessary that in all cases the written agreement to refer the matter to arbitration must be signed by both parties; and *Morgan v. (W) Harrison Ltd* [1907] 2 Ch 137 at p. 104 where the court held that an arbitration agreement may be deduced from correspondence between the parties.

> [23] In the local case of *Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9, Mahadev Shankar JCA in delivering the judgment of the Court of Appeal was of the view that *the fact that the appellant there had not dated or signed the sale and purchase agreement did not mean that there could be no concluded contract evidenced in writing. His Lordship was also of the view that where a contract had been signed by one party only, it could be enforced where there was evidence, such as part performance by one party and acceptance by the other, that the other party had elected to be bound by it.* In the present case, the appellant's emails to the respondent seeking deferment of shipments and then performance fully satisfy the criteria that the sales contracts are binding between them. (emphasis added)

[137] In *Heller Factoring (M) Sdn Bhd v. Metalco Industries (M) Sdn Bhd* [1995] 3 CLJ 9; [1995] 2 MLJ 153; [1995] 2 AMR 1353 ("*Heller Factoring*"), which *dicta* of Mahadev Shankar JCA was cited with approval by the Federal Court in *Ajwa*, the Court of Appeal had the occasion to consider the effect of an agreement that was only signed by one party to the agreement – whether there was a concluded contract between the parties or merely an offer to enter into an agreement by the party who signed the agreement.

[138] Mahadev Shankar JCA, delivering the majority judgment of the Court of Appeal, held that the mere fact that one party had not signed the agreement did not necessarily mean that there could not be a concluded contract. His Lordship held:

> It was strenuously submitted that because Matang had not dated or signed this document there could be no concluded contract. We are unable to subscribe to this view. **The true position is that where a contract has been signed by one party only it can be enforced where there is evidence that the other party has elected to be bound by it**. … (emphasis added)

[139] The High Court in *Pacific Bunkers Pte Ltd v. Owners Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" And Another Case* [2015] CLJU 109; [2015] 1 LNS 109; [2015] 2 AMR 887; [2015] MLJU 0136, ("*Pacific Bunkers*") followed the Federal Court's *dicta* in *Ajwa*. In *Pacific Bunkers*, the two agreements for the plaintiff's sale and supply of bunkers to the defendant's two vessels were not signed. Wong Kian Kheong JC (as he then was) held that both agreements constituted two contracts for the sale of goods under s. 5(2) of the Sale of Goods Act 1957 ("SOGA") because the contracts were in writing; and/or the contracts may be implied by the conduct of parties. His Lordship also held that s. 5(2) of the SOGA does not require a contract of sale of goods to be signed by the parties.

[140] In respect of contracts of sale of housing accommodation in a housing development, where the licensed housing developer is not the proprietor of the land on which the housing development is carried out, reg. 10 of the HDR 1989 requires the contracts of sale to be entered by both the developer

and the landowner with the purchase. Also, the landowner must agree to the sale of the land for the purposes specified in the contract of sale. Regulation 10 reads:

> 10 Proprietor to be a party to a contract of sale
>
> No licensed housing developer who is not the proprietor of the land upon which a housing development is carried out shall enter into any contract of sale of any housing accommodation in that housing development unless **the proprietor of the land is also a party to such contract of sale and agrees to the sale of the land for the purposes specified in such contract of sale.** (emphasis added)

[141] "Contract of sale" is defined in reg. 1 of the HDR 1989 as "the sale and purchase agreement prescribed in reg. 11".

[142] Likewise, "sale and purchase agreement" is defined in art. 1 of the privatisation agreement as "the contract of sale for the sale and purchase of the properties under the development".

[143] Therefore, based on these definitions, the SPAs are "contracts of sale" under the HDR 1989, as well as the privatisation agreement. Thus, the question for this court's determination is whether there is a legal requirement for the SPAs to be signed by all the parties for it to be a concluded contract between the parties.

[144] Pursuant to reg. 10 of the HDR 1989, because Sazean – who is the licensed housing developer of the Anjung Sari project – is not the owner of the land, PKNS as the landowner must be a party to the SPAs, and it must agree to the sale of the land for the purposes specified in the SPAs. Additionally, as the houses at Phase 2 of Anjung Sari have yet to be constructed at the time of the execution of the contract of sale, the SPAs are in the statutory form prescribed in Schedule G of the HDR 1989.

[145] The HDR 1989 and the HDA 1966 are social legislations. This was reiterated by the Federal Court in the seminal case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60; [2021] 3 AMR 449 ("*PJD Regency*"). Tengku Maimun Tuan Mat CJ delivering the judgment of the court said:

> [27] *That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute* (see the decisions of the Federal Court in: *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141 and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281).
>
> [28] The long title of a statute is relevant to its interpretation (see s. 15 of the Interpretation Acts 1948 and 1967). *The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.* (emphasis added)

[146] Unlike the HDA 1966 and the HDR 1989, the Contracts Act 1950 and SOGA are not social legislations. Also, the contracts of sale in *Ajwa*, *Heller Factoring*, and *Pacific Bunkers* are between commercial entities with equal bargaining powers – the agreement in *Ajwa* was for the sale and purchase of palm oil between commercial traders of palm oil; the agreement in *Heller Factoring* was for the sale and purchase of a hydraulic press machine between a factoring company and a metal company; and the agreements in *Pacific Bunkers* were for sale and purchase of ship bunkers between a bunker company and a ship owner.

[147] Nonetheless, the Federal Court in *Ajwa* held that sales contracts are not subject to any condition that they be signed in order for them to effect. Similarly, the Court of Appeal in *Heller Factoring* held that the fact that one party to the agreement had not signed the agreement did not necessarily mean that there could not be a concluded contract. And the High Court in *Pacific Bunkers* held that s. 5(2) of the SOGA does not require a contract for the sale of goods to be signed by the parties for it to be a valid and binding contract between the parties.

[148] Whereas the SPAs in this instant case are between purchasers, the developer, and the landowner, which the Supreme Court and the Federal Court have recognised are of unequal bargaining powers.

[149] Suffian LP in *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31 ("*SEA Housing*"), at p. 311 (CLJ); p. 34 (MLJ), observed that Parliament enacted the HDA 1966 to protect homebuyers from "rich and powerful developers". His Lordship said:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that *to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act.* (emphasis added)

[150] Additionally, the Federal Court in *PJD Regency* held that in interpreting social legislation, a court must give effect to the intention of Parliament and not the intention of the parties. Otherwise, the Legislature's attempt to level the playing field by mitigating the inequality of bargaining power between the purchasers and the developer will be rendered nugatory and illusory. Tengku Maimun Tuan Mat CJ said:

> [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is "social legislation". *A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class*

A *of persons.* Given that one side always has the upper hand against the to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. …

[33] … *When it comes to interpreting social legislation, the State having statutorily intervened, the courts must give effect to the intention of Parliament and not the*
B *intention of parties. Otherwise, the attempt by the Legislature to level the playing field by mitigating the inequality of bargaining power would be rendered nugatory and illusory.* (emphasis added)

[151] The Federal Court summarised the principles on the interpretation of social legislation in para. [36] of *PJD Regency* as follows:

C (i) Statutory interpretation usually begins with the literal rule. However, and without being too prescriptive, where the provision under construction is ambiguous, the courts will determine the meaning of the provision by resorting to other methods of construction foremost of which is the purposive rule (see the judgment of this court in *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97).

D (ii) *The literal rule is automatically displaced by the purposive rule when it concerns the interpretation of the protective language of social legislation.*

(iii) For the avoidance of doubt, it is important to emphasise that even where a term or provision of a social legislation or a statutory contract
E enacted thereunder is literally clear or unambiguous, *the court no less shoulders the obligation to ensure that the said term or provision is interpreted in a way which ensures maximum protection of the class in whose favour the social legislation was enacted.* (emphasis added)

[152] Hence, in interpreting a sale and purchase agreement for houses in a
F housing development, which agreement is in the format prescribed in the HDR 1989, this court must interpret the agreements with the purposive rule.

[153] The Federal Court in *PJD Regency* held that it is evident from the long title to the HDA 1966 that the Act was for the protection of the interest of purchasers and matters connected with therewith. Tengku Maimun Tuan
G Mat CJ said:

[28] The long title of a statute is relevant to its interpretation (see s. 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.
H

[154] Therefore, in determining whether the SPAs are the concluded contract between the plaintiffs, Sazean, and PKNS for the purchase of the houses at Phase 2 of Anjung Sari and whether PKNS is a party to the SPAs – including the ones it did not sign, this court must use the purposive rule.

I **[155]** In doing so, the first question this court asks itself: what was the purpose of Parliament requiring the landowner to be a party to the sale and purchase agreement of houses in a housing development where the licensed

housing developer is not the landowner? The purpose, as stated in the long title of the HDA 1966, is to protect the interest of the purchasers and for matters therewith *ie*, matters connected with the protection of the purchasers.

[156] The second question: where a landowner did not sign the sales and purchase agreement statutorily prescribed by the HDR 1989, does it mean that the landowner is not a party to the sale and purchase agreement and there is no concluded and enforceable contract between the purchaser and the landowner? I find the answer is in the negative for the following reasons:

(i) article 16.2 of the privatisation agreement stipulates that PKNS must enter into the SPAs upon receipt of a written request from Sazean, and PKNS agreed to abide and/or comply with reg. 5(5)(a) and regs. 10 and 11 of the HDR 1989;

(ii) regulation 5(5)(a) of the HDR 1989 states that where the licensed housing developer is not the proprietor of the land, no advertisement or sale permit shall be issued and no advertisement or sale can be made for any housing development unless the landowner has executed an agreement with the licensed housing developer that (a) the landowner agrees to the sale of the land for the housing development concerned; and (b) the landowner agrees to abide by the provisions of reg. 10 of the HDR 1989;

(iii) under reg. 10 of the HDR 1989, the landowner is statutorily required to be a party to the contract of sale of any housing development, and must agree to the sale of the land for the purposes specified in the SPAs. Pursuant to reg. 11 of the HDR 1989, the contract of sale for the sale and purchase of a housing accommodation in a housing development must be in the form prescribed in Schedule G of the HDR 1989;

(iv) there is nothing in the HDR 1989 which requires a sales and purchase agreement in the format prescribed in the schedules of the HDR 1989 to be signed by the parties to be valid and binding; and

(v) the Federal Court in *Ajwa* and the Court of Appeal in *Heller Factoring* held that an agreement is a concluded contract even it is not signed by one or both parties, and the agreement can be enforced where there is evidence, such as part-performance by one party and acceptance by the other, that the other party had elected to be bound by the agreement.

[157] The third question: was there part-performance by the parties in the SPAs in this instant case? Based on the facts in this case, the answer is in the affirmative. The plaintiffs had paid the deposits under the SPAs, Sazean had accepted the deposits; and PKNS had taken the deposits.

[158] PKNS in para. 17 of its amended defence denied receiving the deposits paid by the plaintiffs under the SPAs to Sazean. However, the facts show that PKNS's denial of having received the deposits is untrue. Under the

settlement agreement, PKNS had taken the deposits paid by the purchasers under the SPAs – termed "Phase 2 sale collection". Pursuant to cl. 2.4, PKNS had deducted the Phase 2 sale collection from the reimbursement payable to Sazean. The relevant provisions under the settlement agreement that show that PKNS had taken the deposits paid under the SPAs are reproduced below:

> H. As of the date of this Settlement Agreement the Company has collected the sum of Ringgit Malaysia Three Million Eight Hundred Seventy Nine Thousand One Hundred Thirty Six and Sen Thirty Two (RM3,879,136.32) only from the Purchasers of Phase 2 (hereinafter referred to as "Phase 2 Sale Collection").
>
> 2.4 Subject to the receipt by PKNS of Phase 2 Titles, PKNS shall pay and/or refund to the Company within Two (2) weeks from the date of this Settlement Agreement or from the date of the receipt of the Phase 2 Titles thereof (whichever is the later), the sum of Ringgit Malaysia Eight Million Four Hundred Fifty Three Thousand Three Hundred Six and Sen Twenty Two (RM8,453,306.22) only being payment and/or refund as follows:
>
> (i) Refund of part of PKNS Entitlement earlier paid by the Company to PKNS for the amount of Ringgit Malaysia Five Million Four Hundred Seventy Nine Thousand Three Hundred Seventeen and Sen Sixty Four (RM5,479,317.64) only; and
>
> (ii) Reimbursement to the Company of the Phases 2 Development Costs **after deducting the Phase 2 Sale Collection** totalling Ringgit Malaysia Two Million Nine Hundred Seventy Three Thousand Nine Hundred Eighty Eight and Sen Fifty Eight (RM2,973,988.58) only. (emphasis added)

[159] Furthermore, contrary to its own denial, counsel for PKNS submitted that PKNS had received the deposits from Sazean under the settlement agreement and is prepared to refund the deposits to the plaintiffs. Paragraph 3 of the "second defendant's closing reply" is reproduced below:

> 3. In relation to "Deposits" paid by Plaintiffs, the 2nd Defendant is prepared to refund the said "Deposits" to Plaintiffs since 2nd Defendant has received the "Deposits" from 1st Defendant under "Settlement Agreement".

[160] PKNS had also taken delivery of the SPAs, the issue documents of title of the lots purchased by the purchasers of Phase 2 of Anjung Sari, and vacant possession of the land on which the houses in Phase 2 of Anjung Sari are to be built.

[161] Furthermore, PKNS's action in taking the deposits and, thereafter, issuing the second, third and fourth offers of SPA termination to P3, P4, and P5, where they had asked the plaintiffs to execute a perjanjian penyelesaian dan pembatalan in exchange for the return of the deposit together with

interest and the option to buy a house in PKNS' Casa Sutra development for a discounted price, shows that they had accepted that they are parties to the SPAs. They are estopped from now denying that they are parties to the SPAs. The Court of Appeal in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996; [2006] 1 MLJ 505; [2006] 2 AMR 1, the Court of Appeal, per Gopal Sri Ram JCA (as he then was), quoted with approval the following passage from the *American Jurisprudence*, 2nd edn, vol. 28, 1966, pp. 677 to 680:

> *Estoppel by the acceptance of benefits:* Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.
>
> *As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.*
>
> This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience.
>
> (emphasis added)

[162] The Federal Court in *PJD Regency* (at para. [46] of its judgment observed that because the prescribed contracts of sale in the HDR 1989 require that 10% of the purchase price be paid upon signing of the SPAs, the payment of the 10% deposit and the signing of the sale and purchase agreements would be done simultaneously.

[163] The evidence in this instant case shows (discussed in paras. [29] and [30] above) that P3, P4 and P5 had paid the 10% deposit under the SPAs on 14 May 2014. Since the date of the payment of the 10% deposit and the signing of the SPAs are done simultaneously, the dates of the SPA with P3 and P4, and the SPA with P5 is 14 May 2014.

Finding On Issue (ii)

[164] Therefore, for the reasons above, this court finds that PKNS is a party to the SPAs with P1, P2, P3, P4 and P5.

[165] This court further finds that the SPAs are concluded and binding contracts between the plaintiffs, Sazean and PKNS.

Issue (iii): Is There A Privity Of Contract Between The Plaintiffs And PKNS Under The SPAs?

[166] PKNS, after taking possession of the land and after having received the SPAs and the deposits paid by the purchasers of Phase 2 of Anjung Sari under the settlement agreement, decided not to proceed with the construction of the houses.

[167] PKNS' position is that it is under no obligation to complete the construction of the houses in Phase 2 of Anjung Sari because it had entered into the SPAs as a landowner and not as a developer of the project. Also, because it did not ask Sazean to novate the SPAs to it. One cannot help but query the logic of PKNS' argument – is a novation agreement necessary to make PKNS a party to the SPAs, seeing that PKNS is already a party and is statutorily required under the HDR 1989 to be a party to the SPAs?

[168] Learned counsel for PKNS submits that the obligation to build, construct, and deliver vacant possession of the houses in Phase 2 of Anjung Sari lies solely with Sazean under the SPAs. He says that as PKNS did not enter into a novation agreement and/or assignment agreement and/or supplementary sales and purchase agreements with the plaintiffs, it is under no obligation to build the houses. Mr Ganapathi stated in his written submissions that PKNS cannot be compelled to carry out Sazean's duties and responsibilities under the SPAs. He relies on the Court of Appeal's decision in *Glomac Alliance Sdn Bhd v. Nordin Md Zain* [2023] 3 CLJ 485; [2023] 3 MLJ 393; [2023] AMEJ 0181 ("*Glomac*"), which he submits is binding on this court under the principle of *stare decisis*.

[169] What does the principle of "*stare decisis*" mean? It means "stand by things decided" *ie*, that the *ratio decidendi* of a higher court is binding on an inferior court.

[170] The question before this court is whether – as submitted by counsel for PKNS – based on the *ratio decidendi* of the Court of Appeal in the *Glomac* case, the plaintiffs do not have the privity of contract with PKNS? The answer depends on what was the *ratio decidendi* of the Court of Appeal in the *Glomac* case.

[171] In the *Glomac* case, the developer – Austral Development Sdn Bhd ("Austral Development"), and the landowner – Score Option Sdn Bhd ("Score Option") had entered into sale and purchase agreements ("the Austral Yarra SPAs") with the purchasers of 198 units ("the sold units") in Austral Yarra Link housing development. The respondent was one of the purchasers of the sold units and was a party to the Austral Yarra SPA with the Austral Development and the Score Option.

[172] Subsequently, both Austral Development and Score Option were wound up. The receivers and managers of Score Option then sold the land to Glomac pursuant to the sale and purchase agreement dated 21 January 2011 between the receivers and managers of Score Option and Glomac ("the Score Option-Glomac agreement").

[173] Unlike PKNS in this instant case, Glomac was not a party to the Austral Yarra SPAs. It was a party to the Score Option-Glomac agreement. And the respondent was not a party to the Score Option-Glomac agreement. The Score Option-Glomac agreement expressly excluded the sold units.

[174] The issue before the Court of Appeal in the *Glomac* case was whether the respondent could rely on the Score Option-Glomac agreement to compel Glomac to take all steps required to vest legal and beneficial ownership and deliver vacant possession of the sold unit that the plaintiff had purchased to the plaintiff. The Court of Appeal held that the answer was in the negative because the respondent was not a party to the Score Option-Glomac agreement.

[175] The Court of Appeal held that because the respondent was not a party to the Score Option-Glomac agreement, and there was no novation or assignment of the Score Option-Glomac agreement to the respondent, there was no privity of contract between the respondent and Glomac in the Score Option-Glomac agreement.

[176] Accordingly, what was the *ratio decidendi* in the *Glomac* case *ie*, the reason for the Court of Appeal's decision? Based on the Court of Appeal's written judgment, the reason was that the respondent does not have a privity of contract with Glomac under the Austral Yarra SPA and the Score Option-Glomac agreement: (i) Glomac was not a party to the Austral Yarra SPA between the respondent and Austral Development and Score Option; and (ii) the respondent was not a party to the Score Option-Glomac agreement between the respondent and managers of Score Option and Glomac; and there was no assignment or novation of the Score Option-Glomac agreement to the respondent.

[177] In contrast, in this instant case, PKNS is the landowner and is a party to the SPAs with the plaintiffs and the developer. In fact, the Court of Appeal in the *Glomac* case agreed with the findings of the lower courts that the respondent purchaser has a privity of contract with the developer and the landowner in the Austral Yarra SPA. Hence, pursuant to the *Glomac* case, the plaintiffs in this instant case do have the privity to contract with Sazean and PKNS under the SPAs.

[178] However, if, like Score Option in the *Glomac* case, PKNS was wound up and its receivers and managers sold the Anjung Sari land to a third party pursuant to the sales and purchase agreement between PKNS' receivers and managers and the third party ("the third party agreement") and the houses sold under Phase 2 of Anjung Sari were excluded from the third party agreement, pursuant to the Court of Appeal's *ratio decidendi* in the *Glomac* case, the plaintiffs would not have privity of contract under the third party agreement because they are not parties to the said agreement.

[179] For this reason, this court finds that there is no merit in the submission by counsel for PKNS that pursuant to the Court of Appeal's decision in the *Glomac* case, there is no privity of contract between PKNS and the plaintiffs under the SPAs because the SPAs were not assigned or novated to PKNS.

Findings On Issue (iii)

[180] Accordingly, for the above reasons, this court finds that there is a privity of contract between the plaintiffs and PKNS under the SPAs.

Issue (iv) Are The SPAs Capable Of Performance? Are They Frustrated?

[181] One of PKNS' pleaded defences is that the SPAs were impossible to perform at the time they were entered, and were void for frustration.

[182] Counsel for PKNS submits because the SPAs were impossible to perform, pursuant to s. 57(3) of the Contracts Act 1950, any compensation payable to the plaintiffs should be paid by the Sazean and not PKNS. Section 57(3) of the Contracts Act 1950 reads:

> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.

[183] Mr Ganapathi argues that Sazean, with reasonable due diligence, should have known that the SPAs would have been impossible to perform by Sazean as a developer and that the promises made to the plaintiffs as regards the construction of the houses could not have been performed.

(a) Did Sazean Breach The Stop Work Order By Entering Into The SPAs With The Plaintiffs?

[184] PKNS pleaded that the SPAs were impossible to perform because of Sazean's conduct in breaching PKNS' stop work order. Paragraph 15 of PKNS' amended defence reads:

> Defendan Kedua seterusnya menegaskan bahawa Defendan Kedua maklum bahawa Defendan Pertama telah gagal untuk melaksanakan Fasa (2) dan oleh yang demikian Perjanjian Jualbeli diantara Defendan Pertama dan Plaintif Pertama telah menjadi mustahil dilaksanakan ("frustrated") oleh sebab perlakuan Defendan Pertama. Perlakuan Defendan Pertama yang dimaksudkan adalah mengingkari arahan Defendan Kedua pada 8hb Mei 2013 supaya Defendan Pertama tidak memasuki apa jua Perjanjian Jual Beli dengan mana-mana pembeli. Defendan Kedua menegaskan bahawa walaupun tidak berobligasi untuk melakukannya, Defendan Kedua ada membuat tawaran bayaran *"ex-gratia"* secara "tanpa prasangka" kepada Plaintif Pertama.

[185] In item 2.4 of the stop work order, PKNS prohibited Sazean from entering into sales and purchase agreements and from selling units which construction have been completed. The order did not state that Sazean is prohibited from selling any units. Item 2.4 of PKNS' stop work order reads:

> 2.4 Berkuat-kuasa serta-merta, pihak Tuan adalah dilarang daripada memasuki atau menandatangani apa-apa Perjanjian Jual Beli atau dalam apa acara sekalipun, **menjual mana-mana unit yang telah disiap dibina** kepada mana-mana pihak. (emphasis added)

[186] It follows, therefore, that PKNS' pleading in its amended defence that "arahan defendan kedua pada 8 Mei 2013 supaya defendan pertama tidak memasuki apa jua perjanjian jual beli dengan mana-mana pembeli" is incorrect. It is a misstatement of what was written in item 2.4 of the stop work order.

[187] It is not disputed that when PKNS issued the stop work order, Sazean had not commenced constructing the houses in Phase 2 of Anjung Sari. Therefore, as the construction of the houses in Phase 2 of Anjung Sari had not commenced, let alone completed, Sazean was not prohibited by a stop work order from entering into the SPAs with the plaintiffs and the other purchasers of the houses, which were to be constructed in Phase 2 of Anjung Sari.

[188] Furthermore, PKNS' main witness, SD6, testified that the SPAs with P1 and P2 were signed before the stop work order. SD6 said that the date on the SPA was the stamping date and not the date the parties signed the agreement. The excerpt of SD6's testimony under re-examination by PKNS' counsel is reproduced below:

PKNS' Counsel:	Mengapa En Suhaimi mengatakan tidak bersutuju bahawa PKNS menandatangani perjanjian ini selepas notis larangan bulan Mei 2013? Tolong jelaskan.
SD-6:	Yang Arif, perjanjian jualbeli PKNS biasanya PKNS tandatangan awal apabila pihak pemaju, Sazean melalui peguam mengemukakan kepada PKNS dan PKNS tandatangan. Selepas pada PKNS tandatangan, PKNS akan mengembalikan semula kepada pihak Sazean dan hanya selepas itu, baru diuruskan stamping dan PKNS pasti tidak menandataangani apa-apa perjanjian selepas notis berhenti kerja dikeluarkan.
PKNS' Counsel:	So, bila PKNS menandatangani perjanjian ini, adakah tarikh 27hb Ogos itu tertera?
SD-6:	Tidak. Kita tidak menandatangani pada 27hb Ogos.

[189] For this reason, this court finds that Sazean had not breached the prohibition in the stop work order by entering into the SPAs with the plaintiffs for the sale of the houses, which construction had not yet commenced.

(b) Were The SPAs For Agreements That Were Impossible To Perform?

[190] Under s. 57(1) of the Contracts Act 1950, an agreement to do an impossible act in itself is void.

[191] Were the SPAs impossible to perform when the plaintiffs entered into the SPAs? Are the SPAs void under s. 57(1) of the Contracts Act 1950?

[192] The SPAs with P1 and P2 entered into the SPAs on 27 August 2013. The SPAs with P3, P4, and P5 are undated but the evidence shows that they had paid the deposits under the SPAs on 14 May 2014. At the time the plaintiffs entered into the SPAs, the privatisation agreement was in effect (it was only terminated by PKNS in November 2019) and Sazean and PKNS had not yet entered into the settlement agreement.

[193] PKNS' main witness, SD6, says that PKNS does not have any intention to continue to develop the Phase 2 land. Nevertheless, after he was shown the 14 August 2014 letter by Sazean's counsel, SD6 admitted that it is PKNS' obligation to develop the Phase 2 land. The excerpt of SD6's testimony is reproduced below:

Sazean's counsel:	OK, Encik, sekarang, Encik, apakah pendirian PKNS berkenaan dengan pengambilan balik tanah Fasa 2, adakah PKNS akan menyambung pembangunan di atas tanah PKNS atau pun sebaliknya?
SD-6	PKNS tidak bercadang untuk menyambung
Sazean's counsel:	Tidak langsung?
SD-6	Tidak bercadang
Sazean's counsel:	Ok baik. One second. Yang Arif. Encik Yang Arif, I'm referring to D3. Encik boleh ambil bundle D3? Tolong. Encik, cuba lihat muka surat 21, My Lady, I'm referring to page 21. Encik, ini, boleh sahkan ini adalah surat PKNS, ditulis kepada Sazean?
SD-6:	Betul, ini surat PKNS.
Sazean's counsel:	Betul ya. OK, cuba lihat perenggan 2, saya baca dengan izin, Yang Arif. "Sepertimana yang tuan sedia maklum, PKNS telah menandatangani Perjanjian Penyelesaian bersama Sazean Development Sdn Bhd pada 20 Jun 2014 di mana PKNS telah membenarkan syarikat meneruskan projek Pembangunan bagi Fasa 1", right, "manakala tanah bagi projek Fasa 2 akan diambilalih oleh PKNS untuk dibangunkan". Encik, *saya katakan surat ini, apa yang saya baca ini last line itu, alright, "manakala tanah bagi projek Fasa 2 akan diambilalih oleh PKNS untuk dibangunkan" jelas menyatakan pendirian PKNS untuk mengambil alih tanah tersebut dan seterusnya dibangunkan.* Surat ini, bukan saya katakan, surat ini.
SD-6:	*Betul*
Sazean's counsel:	Betul, ya?

SD-6:	Betul
Sazean's counsel:	Baik. Jadi apa yang sebelum ini Encik katakan kepada Mahkamah bahawa pendirian PKNS untuk tidak membangunkan tanah Fasa 2 adalah tidak tepat?
SD-6:	Tepat sebenarnya. Yang Arif, boleh saya -
Sazean's counsel:	Tunggu. OK, Encik, soalannya begini, jikalau tanah itu telah diambil alih oleh PKNS daripada Sazean, bagaimana Sazzean boleh membangunkan tanah Fasa 2, bagaimana? Menerusi perjanjian penswastaan ok, tanah itu diberikan kepada Sazean untuk membangunkan dan telah dipersetujui ada dua fasa, Fasa 1 dan Fasa 2. Fasa 1 adalah di tanah ini. Sekarang, bagaimana Sazean boleh membangunkan, development, di atas tanah Fasa 2 apabila tanah tersebut, subject matter telah pun diambil alih PKNS. Bagaimana?
SD-6:	Seperti yang saya sebutkan tadi, *Fasa 2 tidak akan dibangunkan seperti yang dirancang oleh Sazean. Surat ini bermaksud tanah tersebut diserahkan kepada PKNS dan PKNS akan membangunkan mengikut perancangan PKNS sendiri,* bila dan itu. Cuma perjanjian jual beli yang Sazean telah tandatangan dengan pembeli Fasa 2, PKNS sebagai tuan tanah sahaja.
Sazean's counsel:	OK. Jadi setuju ke dengan saya, saya faham jawapan Encik. *Setuju ke dengan saya bahawa adalah mustahil untuk Sazean membuat pembangunan atau di atas, untuk Fasa 2 kerana tanah itu telah diambil alih oleh PKNS, betul ke tidak adalah mustahil?*
SD-6:	*Betul*

(emphasis added)

[194] The terms of the settlement agreement and PKNS' letter of 14 August 2014, show that PKNS had intended to develop Phase 2 land when it took over the land from Sazean. But, as is evident from SD6's testimony, PKNS decided not to develop Phase 2 of Anjung Sari on the land. After taking over the land, PKNS proceeded to send offers to terminate the SPAs to the purchasers of the houses at Phase 2.

[195] Based on these facts and the terms of the privatisation agreement and the settlement agreement, I disagree with the submission of PKNS' counsel that Sazean, with reasonable diligence, should have known that the SPAs were impossible to perform when it executed the SPAs with the plaintiffs. The facts show that the SPAs were not impossible to perform at the time the parties executed the SPAs.

[196] The reason the SPAs are not performed, in that the houses sold are not built to date, is because PKNS decided not to develop Phase 2 of Anjung Sari on the land after it had taken possession of the land from Sazean. As SD6

told this court under cross-examination "Fasa 2 tidak akan dibangunkan seperti yang dirancang oleh Sazean … PKNS akan membangunkan mengikut perancangan PKNS sendiri".

[197] In paras. 15 and 20 of its amended defence, PKNS stated that it had made an offer of an "*ex gratia*" payment on a "without prejudice" basis to P1 and P2, respectively, even though it was under no obligation to do so. Paragraph 15 of PKNS' amended defence is reproduced in para. [184] above. What PKNS failed to state in its pleadings was that the offers were made in exchange for the plaintiffs executing the settlement and termination agreement prepared by PKNS' lawyers.

[198] It would not be necessary for the plaintiffs to agree to terminate the SPAs if the SPAs are frustrated agreements and, accordingly, void. If PKNS truly believed its own submissions that Sazean, with reasonable diligence, should have known that the SPAs were impossible to perform when it executed the SPAs with the plaintiffs, PKNS would not have sent out the various letters to the purchasers offering to terminate the SPAs. It would have instead informed the purchasers that the SPAs were impossible to perform when the plaintiffs entered into the SPAs, and the SPAs are, thus, frustrated.

[199] But in this instant case, PKNS sent four offers of termination – where the incentive for the plaintiffs to terminate their SPAs increased more and more in each subsequent offer of termination. In the first offer of termination, in return for the plaintiffs executing a settlement and termination agreement prepared by PKNS' lawyers, PKNS offered to return to the purchasers the deposit paid together with 10% interest per annum from the date of payment until 31 May 2015. In the second offer of termination, PKNS upped the offer – in return for terminating their SPAs, PKNS offered a 20% discount from the purchase price of houses valued at RM2.8 million in its Casa Sutra development together with the refund of the deposit paid plus 10% interest per annum; or a refund of the deposit paid plus 10% from the purchase price of the house purchased at Phase 2 of Anjung Sari. In the fourth and final offer of termination, PKNS upped the offer further by offering a 20% discount plus an additional discount of RM200,000 and minus the amount of deposit paid under the SPA, or RM224,000, whichever is higher, from the purchase price of houses at the Casa Sutra development.

[200] Counsel for PKNS cited the case of *Formulexcel Sdn Bhd v. Chong Chee Fah* [2010] CLJU 1609; [2010] 1 LNS 1609; [2010] MLJU 1472; [2010] AMEJ 0504 ("*Formulexcel*") as an authority. However, the facts in this instant case are distinguishable from those in *Formulexcel*.

[201] In *Formulexcel*, the plaintiff and the defendant had entered into a joint venture agreement dated 19 November 1997 ("JVA") to develop four parcels of land: the plaintiff owned the first parcel of land, the defendant owned the second and third parcels and land, and the defendant jointly owned the fourth

parcel of land with a Chong Deng That @ Mary and a Chong Shung Fah. Chong Deng That @ Mary and Chong Shung Fah were not parties to the JVA, even though they were joint owners of the fourth parcel of land with the defendant. The defendant terminated the JVA on 6 July 2006: he contended that the JVA was void for illegality and/or unenforceability because the JVA included the fourth parcel of land, which was not exclusively owned by either the plaintiff or the defendant. The High Court in Kota Kinabalu held that the JVA was void under s. 57(1) of the Contracts Act 1950 because it was impossible to perform the JVA without the participation and consent of the two other owners of the fourth parcel of land.

[202] Whereas, in this instant case, both the developer and the proprietor had agreed to the sale of the land to the purchasers for the purpose of the SPAs. In fact, PKNS is statutorily required under the HDA 1966 and the HDR 1989 to be a party to the SPAs and to agree "to the sale of the land for the purpose of the agreement." It was, therefore, not impossible to perform the SPAs since the plaintiffs had entered into the SPAs for the purchase of the houses in Phase 2 with both the developer (Sazean) and the proprietor (PKNS).

[203] Mr Ganapathi also quoted the following excerpts from *Pollock & Mulla on Indian Contract and Specific Relief Acts*, 11th edn, RK Abichandani vol. 1 in support of PKNS' case that the SPAs are frustrated.

> At p. 589: Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any such loss which such promisee for any loss which such promisee sustains through the non-performance of the promise.
>
> At pg. 592: Frustration by Breach and Frustration – *Frustration by breach must be distinguished from the doctrine of frustration of contract. Frustration by breach arises where the failure of performance is due to the act or default of one of the parties, but true frustration will only occur if the frustrating event was not caused by the fault of either party to the contract.* Moreover, in cases of frustration by breach, the innocent party may elect to affirm the contract, but where there is true frustration, the contract is determined automatically, and it cannot be continued by affirmation. (emphasis added)

[204] In this instant case, why were the houses purchased by the plaintiffs under the SPAs in Phase 2 of Anjung Sari not constructed and vacant possession not delivered? It is because, as SD6 informed this court during the trial, PKNS does not want to develop the Anjung Sari project on the land, which was conceptualised and designed by Sazean. PKNS intends to develop its own housing project on the land and the Anjung Sari project.

[205] Accordingly, in the circumstances, Sazean would not have known, at the time the SPAs were entered with the plaintiffs, that PKNS would not allow it to develop Phase 2 of Anjung Sari and would take back the land before it could commence the construction of the houses in Phase 2 of Anjung Sari. And it could not have known that PKNS, after taking back the land, would decide not to develop Phase 2 on the land.

[206] Therefore, based on the excerpt in p. 592 of *Pollock & Mulla* quoted by Mr Ganapathi in his submissions, even if the SPAs were frustrated, it was not a "true frustration" because the impossibility of construction of the houses purchased under the SPAs was caused by PKNS' refusal to develop Phase 2 of Anjung Sari after it had taken over the land from Sazean.

(c) Did The SPAs Become Impossible To Perform?

[207] Under s. 57(2) of the Contracts Act 1950, a contract to do an act which after the contract is made becomes impossible or the promisor could not prevent becomes void. Section 57(2) of the Contracts Act 1950 reads:

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[208] Visu Sinnadurai in *Contracts Act: A Commentary,* LexisNexis, 2015 at p. 472 para. [57.25] said:

> As a general rule, a party cannot rely on the doctrine of frustration as a defence for non-performance of a contract, if he himself had been responsible for bringing about the frustrating event; that is, the event which a party relies upon as frustrating his contract must not be self-induced.

[209] The Court of Appeal in *Dato' Yap Peng Eng & Ors v. Public Bank Bhd & Ors* [1997] 4 CLJ 115; [1997] 3 MLJ 484; [1997] 4 AMR 3817 applied the common law principle that a party cannot rely on the doctrine of frustration as a defence, if the event which he relied on as frustrating the contract was self-induced. Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal, said that the court are in entire agreement with Kerr J in the English case of *Dalmia Dairy Industries Ltd v. National Bank Of Pakistan* [1978] 2 Lloyd's Rep 223, where he said:

> The issue (frustration or not) has got to be decided by the court *ex post facto* on the actual circumstances of the case.

[210] In *Dato' Yap Peng v. Public Bank Bhd*, the Court of Appeal said that under the order, it was for the appellants to apply for and obtain the consent of Bank Negara Malaysia ("BNM") if they wished to exercise their right of redemption over movables or to discharge a charge over immovables. The appellants did not apply for BNM's consent. The Court of Appeal held that

in such circumstances, if there was frustration, the frustration was self-induced. It held that self-induced frustration is not frustration recognised by law. Gopal Sri Ram JCA at p. 125 (CLJ); p. 493 (MLJ) said:

> … On the authority of *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corp Ltd* [1942] AC 154, *self-induced frustration is not frustration recognized by law.* See also *Maritime National Fish Ltd v. Ocean Trawlers Ltd* [1935] AC 524.
>
> …
>
> Needless to say, that *because of the provision for consent being applied for and obtained from Bank Negara which appears in the Order, the test is not satisfied on the facts of this case.* (emphasis added)

[211] In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666; [2000] 3 AMR 3209, the Court of Appeal held that the failure of the State Government, who is one of the parties to a consent order, to perform its obligation under the consent order to secure an alienation of land by the relevant State authority to the other party, was a "self-induced frustration".

[212] In *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1; [2005] 5 AMR 1, the Court of Appeal agreed with the finding of the High Court Judge that a contract was not frustrated when a purchaser of a commercial property was unable to obtain a bank loan to pay the balance of the purchase price because the purchaser refused to accept new conditions imposed by bank in accordance with the requirements of Bank Negara. The Court of Appeal held that even if the contract was frustrated, it was self-induced frustration.

[213] In this instant case, the SPAs became impossible to perform because PKNS does not want to develop Phase 2 of Anjung Sari after it had taken over possession of the Phase 2 land from Sazean. Even though it had the right to do so under cl. 3.4 of the settlement agreement, PKNS did not ask Sazean to execute or procure the execution of the forms and documents necessary for PKNS to take over the development of Phase 2 of Anjung Sari and to change the operation of the HDA accounts.

[214] In the circumstances, if there was frustration of the SPAs, it was self-induced by PKNS. As held by the Court of Appeal in *Dato' Yap Peng v. Public Bank Bhd,* such self-induced frustration is not recognised by law.

Findings On Issue (iv)

[215] Based on the applicable law, the facts, and the circumstances of this case, this court finds that the SPAs were not frustrated.

[216] Additionally, this court finds that the SPAs were not impossible to perform at the time the SPAs were made. They were not agreements to do an act which was impossible. Accordingly, the SPAs are not void under s. 57(1) of the Contracts Act 1950.

[217] This court further finds that even if the development of the houses in Phase 2 of Anjung Sari became impossible after PKNS took back the land under the settlement agreement, the impossibility was not an event that PKNS could not prevent – it was self-induced by PKNS. Accordingly, the SPAs are not void under s. 57(2) of the Contracts Act 1950.

Issue (v): Is Sazean And/Or PKNS Obliged To Construct And Deliver Vacant Possession Of The Houses In Phase 2 Of Anjung Sari?

[218] Under the privatisation agreement, PKNS privatised the development of its land and appointed Sazean to undertake the development of the land. Sazean had agreed to the development of the land on an "as is where is basis" subject to the terms and conditions in the privatisation agreement.

(a) Purpose And Objectives Of Privatisation Agreement

[219] The purpose and objectives of the privatisation are set out in art. 2.1 of the agreement. It reads:

> The Parties hereto hereby agree with one another to enter into this Agreement for the purpose of carrying out the Development, the funding of the Development Costs by the Company, the sale of the Properties contained in the Development and *the doings of such acts, matters and things as may be necessary or incidental to the attainment of any of the foregoing objectives and towards that end the Parties hereto will co-operate and assist each other and do all such acts and things as may be necessary so that full effect may be given to the completion of the Development Works planned* in accordance with the provision of this Agreement and/or pursuant to the Technical Agreement for Shared Infrastructural Works. (emphasis added)

[220] PKNS and Sazean agreed to enter into the privatisation agreement for the following purposes and objectives:

(i) for Sazean to carry out the development and to fund the development costs;

(ii) for the sale of the properties in the development;

(iii) for the doing of such acts, matters, and things as may be necessary or incidental to the attainment of any of the "foregoing objectives";

(iv) towards the end of achieving the "foregoing objectives", to co-operate and assist each other and do all such acts and things as may be necessary so that the development works planned may be completed.

[221] What are the "foregoing objectives" in art. 2.1 of the privatisation agreement? From the natural and ordinary meaning of the words in the said art. 2.1 and the definition of the words "development", "development costs" and "properties" in art. 1.1, the "foregoing objectives" mean (i) the construction and completion of the link, semi-detached and detached houses, including the infrastructure and landscaping, on the land and the funding of the costs of such development by Sazean; and (ii) the sale of the said houses.

[222] For the first objective of constructing and completing houses, under art. 8.1 of the privatisation agreement, PKNS agreed to make available the land to Sazean, and under art. 8.2, PKNS agreed to grant Sazean the right to enter upon and occupy the land until the completion date of development or during an extension period of completion date or the termination date, as the case may be. Articles 8.1 and 8.2 reads:

> 8.1 Availability
>
> PKNS shall make available to the Company the Land upon the execution of this Agreement or as soon as reasonably practicable after the date of this Agreement but subject to the terms of this Agreement.
>
> 8.2 Grant Of Rights
>
> PKNS hereby grants to the Company the right to enter upon and to occupy the Land from the date it is made available to the Company pursuant to Article 8.1 above until the Completion Date for Development or during an Extension Period of Completion Date granted by PKNS or the Termination Date, as the case may be.

[223] For the second objective of selling the properties in the development, Sazean had entered into the SPAs as "vendor" and PKNS as "proprietor" with the purchasers of the properties, which SPAs are in the prescribed form in Schedule G of the HDR 1989.

[224] Sazean's obligation to construct and complete the houses pursuant to the first objective of the privatisation agreement was predicated on PKNS making the land available to Sazean and granting it the right to enter and occupy the land. Without the right to enter and occupy the land, Sazean was no longer able to construct and complete the houses in Phase 2 of Anjung Sari on it.

[225] Under cl. 3 of the settlement agreement, Sazean was required to immediately vacate and surrender possession of the Phase 2 land to PKNS. Thus, PKNS' obligation to make available the land and grant Sazean the right to occupy the land under arts. 8.1 and 8.2 of the privatisation agreement was varied by the settlement agreement.

[226] Nonetheless, the first objective of completing and constructing the houses in Phase 2 of Anjung Sari still remained – it was not varied by the settlement agreement. As found in issue (i) above, the privatisation agreement was still in force and effect on the date of the settlement agreement. Also, cl. 6.2 of the settlement agreement expressly states that the agreement is supplemental to and must be read together with the privatisation agreement. In addition, both parties agreed under cl. 6.5 that the settlement agreement shall not "prejudice, affect, impair, discharge or diminish the legality, validity and effectiveness of the privatisation agreement", and they are obliged to perform or cause to be performed all their obligations under the privatisation agreement.

[227] Under cl. 6.3 of the settlement agreement, any reference to the privatisation agreement in connection with the "development" *ie*, the construction and completion of the houses on the land, is construed as a reference to the privatisation agreement as varied by the settlement agreement. Clause 6.3 reads:

> *Any reference to the Privatisation Agreement* in any document entered into by the Parties or otherwise *in connection with the Development shall hereafter be construed as a reference to the Privatisation Agreement as the case may be, as so varied by this Settlement Agreement.* (emphasis added)

[228] Based on the settlement agreement, the privatisation agreement in respect of the development was varied as follows:

Privatisation Agreement	Settlement Agreement
Art. 2: All Phases of Anjung Sari – Sazean to carry out the Development Words for the houses at Anjung Sari at its sole costs and expenses.	**Clause 2.5 (ii): Phases 1B and IC of Anjung Sari** – Sazean to complete the Development Works of Phases 1B and 1C of Anjung Sari; – Sazean to obtain the CCC to hand over to the purchasers within 6 months for Phase 1B and 9 months for Phase 1C.
	Clause 3: The Surrender of Phase 2 – Clause 3.3: Sazean to immediately vacate and surrender the vacant possession of Phase 2 to PKNS. – Clause 3.1: Sazean to proceed within 2 weeks of the Agreement to obtain titles of the Phase 2 land and to secure the release of the security for the bridging loan with the bridging financier. – Cause 3.4: Sazean, not later than 7 days, upon receipt of PKNS' written request, execute or procure the execution of any forms or documents for the purpose of PKNS taking over the Development of Phase 2.

[229] It is not disputed that the houses in Phase 2 of Anjung Sari sold to the plaintiffs in the SPAs were double-storey bungalows *ie*, detached houses. Hence, "the purpose of PKNS taking over the development of Phase 2" in cl. 3.4 of the settlement agreement is for PKNS to take over the development of the double-storey bungalows.

[230] Article 2.1 of the privatisation agreement remained in full force and was not varied by the settlement agreement. Therefore, both PKNS and Sazean must "co-operate and assist each other and do all such acts and things as may be necessary so that full effect may be given to the completion of the development works planned". It follows, therefore, that both Sazean and PKNS must co-operate and assist each other and do all necessary to complete the development of Phase 2 of Anjung Sari.

[231] With the surrender of the possession of the Phase 2 land to PKNS under the terms of the settlement agreement, Sazean was no longer able to construct and complete the houses at Phase 2 of Anjung Sari.

[232] Nonetheless, PKNS had agreed under art. 2.1 of the privatisation agreement to do all such acts and things as necessary so that the full effect may be given to the completion of the development works as planned.

[233] It follows, therefore, pursuant to the obligation imposed on it under art. 2.1 of the privatisation agreement, PKNS must do all things necessary to construct and complete the houses of Phase 2 of Anjung Sari.

(b) SPAs Are Contracts Of Sale

[234] As discussed above, the SPAs between the plaintiffs, Sazean and PKNS, are contracts of sale under the HDR 1989 and the privatisation agreement.

[235] PKNS, as the landowner, was statutorily required under reg. 10 of the HDR 1989 to be a party to SPAs and to agree to the sale of the land in the SPAs for the purposes specified in the SPAs. The following is an express term in the contract of sale prescribed in Schedule G of the HDR 1989:

> AND WHEREAS the Proprietor has granted the Developer the absolute right to carry out the housing development and to sell the said Property and **the Proprietor hereby agrees to the sale of the said Property for the purpose of this Agreement.** (emphasis added)

[236] Under reg. 10 of the HDR 1989 and the SPAs, PKNS agreed to the sale of the houses in Phase 2 of Anjung Sari.

[237] PKNS, after taking possession of the Phase 2 land, the issue documents of title of lots and the deposits paid by the plaintiffs under the SPAs, pursuant to the terms of the settlement agreement, refused to develop the Phase 2 land.

[238] PKNS refused and continues to refuse, to request Sazean to execute or procure the execution of any forms or documents or novation agreements of the SPAs for the purpose of PKNS taking over the development of Phase 2 and change in the operation of the HDA accounts.

[239] It is PKNS' case that because it did not ask Sazean to execute any forms or documents for the purpose of it taking over the development of Phase 2 of Anjung Sari and because it did not enter into a novation agreement

or assignment agreement, or supplementary sales and purchase agreement with the plaintiffs, it is not obliged to carry out Sazean's responsibilities and obligations under the SPAs to develop Phase 2 of the Anjung Sari project. PKNS contends that the settlement agreement does not in any way impose any obligation on it as the landowner to take over the development of Phase 2 of Anjung Sari. Also, the plaintiffs cannot in law compel or force it to execute any novation agreement with Sazean. Counsel for PKNS submits:

> Plaintiff cannot in law force 2nd Defendant to "step in the shoes" of the failed Phase 2 development of 1st Defendant. (PKNS) mere landowners cannot in law be compelled to "step in shoes" of the failed development of Phase [2] Anjung Sari and assume all the responsibility of the Developer who is now defunct. Thus, execution rightfully 2nd Defendant as landowners did not execute any Novation Agreement with 1st Defendant.

[240] As found in issue (iii) at paragraph above, PKNS is a party to the SPAs together with Sazean and the plaintiffs. In fact, in *Glomac* (*supra*), the Court of Appeal agreed with the findings of the lower courts that the landowner is a party to the sale and purchase agreement together with the developer and the purchasers of the sold units: see para. [177] above. Accordingly, as PKNS is already a party to the SPAs, there is no necessity for the developer and the purchasers to enter into a novation agreement, to novate the SPAs to PKNS. There is also no requirement for Sazean to assign its rights and liabilities through an assignment agreement to make PKNS a party to the SPAs.

(c) Is This Court Bound By The Decision In Perbadanan Kemajuan Negeri Selangor v. Ruhani Baharum & 9 Ors (B-02(1M)(NCVC)-980-05-2016)?

[241] In its amended defence dated 9 February 2023, PKNS pleaded that the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v. Ruhani Baharum & 9 Ors* (B-02(1M)(NCVC)-980-05-2016) ("*PKNS v. Ruhani Baharum*") overruled the decision of the High Court in *Ruhani Baharum & Yang Lain lwn. Sazean Development Sdn Bhd & Satu Lagi* [2016] CLJU 1241; [2016] 1 LNS 1241; [2016] MLJU 689, where the High Court had dismissed PKNS' application to strike out the plaintiffs' action against it under O. 18 r. 19(1)(b), (c) and (d) and ordered that the action proceed to trial. The plaintiffs are the purchasers of Phase 1 of Anjung Sari, and their claim is for liquidated damages for the late delivery of the houses in Phase 1, in which vacant possession was delivered after the 24 months stipulated in the sale and purchase agreements. The High Court held that the plaintiffs' claim against PKNS disclosed a reasonable cause of action and was not scandalous, frivolous, or vexatious.

[242] The Court of Appeal did not write any grounds of judgment for its decision in *PKNS v. Ruhani Baharum* to overrule the High Court's decision. Nonetheless, PKNS pleaded in para. 6 of its amended defence that the Court

of Appeal had made a unanimous decision that PKNS is not responsible for the development and liquidated damages for the late delivery of Anjung Sari. And in para. 9 of its amended defence, PKNS pleaded:

> 9. Defendan Kedua merujuk kepada Para (15) Pernyataan Tuntutan dan menfailkan pernah mengakujanji membangunkan Tanh yang dikenali sebagai PT No. 26147, H.S.(D) 264207 kepada Plaintif Ketiga dan Plaintif Keempat. Defendan Kedua tidak pernah menandatangani Perjanjian Jualbeli yang dirujuk dalam kapasiti sebagai Tuantanah ("Proprietor") dan segala urusan "Pembangunan" hartanah terbabit adalah dibawah urusan dan tanggungjawab Defendan Pertama. Perkara ini telah diputuskan dan disahkan oleh Keputusan Mahkamah Rayuan.

[243] It is settled law that without written grounds of judgment, the decision of a higher court is not binding under the principle of *stare decisis* on a lower court. This principle of law can be found in the Federal Court cases of *Tetuan Wan Shahrizal, Hari & Co v. PP* [2023] 4 CLJ 843; [2023] 4 MLJ 1; [2023] 4 AMR 389 ("*Tetuan Wan Shahrizal*"); *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177; [2019] 6 MLJ 1; [2019] 5 AMR 554; and *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440; [2019] 7 AMR 385.

[244] In *Tetuan Wan Shahrizal*, the Federal Court held that the High Court Judge fell into error when he decided that he was bound by *stare decisis* to follow a decision of the Court of Appeal in another case where no written grounds of judgment were given. Abdul Rahman Sebli CJ (Sabah and Sarawak) delivering the majority judgment of the court said:

> [13] *What binds the lower courts under the stare decisis doctrine is the ratio decidendi of the case and not mere similarity in the facts or in the law, or in the arguments of counsel, nor the obiter dicta of the case.*
>
> [14] *A lower court relying on an earlier unwritten decision of an appellate court must not assume that by affirming the decision of the lower court, the appellate court must have affirmed every finding of fact and law that the lower court had decided in favour of the winning party.* Experience will tell that it is not uncommon for an appellate court to affirm or reverse the decisions of the lower courts on grounds other than those relied on by the lower courts.
>
> [15] *Nor must the court, in the absence of the written grounds, accept the argument that the appellate court in the earlier case decided the way it did because it accepted counsel's argument, even where the earlier case involved the same counsel. Such acceptance of counsel's argument must be reflected in the written grounds of judgment.* The role of counsel is to assist and the court to decide.
>
> …
>
> [19] Thus, where there are no grounds written, there is no point or principle of law that can officially be decided or settled by the ruling of a competent court. *The correct position of the law is that an unwritten decision of a higher court, whether sitting in its original or appellate jurisdiction, binds the*

A *parties to the action but is not authority for any principle or rule of law and does not bind the lower courts.* This is where the learned judge in the present case fell into error when he said that he was bound by *stare decisis* to follow the unwritten decision of the Court of Appeal in *Md Sukri*.

(emphasis added)

B **[245]** The Federal Court quoted with approval its earlier judgment in *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177; [2019] 6 MLJ 1; [2019] 5 AMR 554, where David Wong Dak Wah CJ (Sabah and Sarawak) delivering the unanimous decision of the court said:

C [40] … As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we are therefore unable to glean any reasons why such a decision was made. Therefore we did not see how the said judgment lent any support to the respondent's case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case.

D **[246]** It also cited with approval its earlier decision in *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440; [2019] 7 AMR 385, where it held that without a written judgment of the Federal Court's reasons for allowing the appeal, the decision cannot be regarded as authoritative or binding.

E **[247]** Counsel for PKNS, Mr R Ganapathi, submitted that the Court of Appeal, by overturning the decision of the High Court in *PKNS v. Ruhani Baharum*, found that PKNS is not responsible for the development and liquidated damages for the late delivery of Anjung Sari. PKNS also contends that the Court of Appeal had found and confirmed that all the development

F of Anjung Sari was Sazean's responsibility.

[248] With respect to counsel for PKNS, following the majority decision of the Federal Court in *Tetuan Wan Shahrizal* – which this court is bound by *stare decisis* because there are written grounds of judgment – this court cannot accept Mr Ganapathi's argument even though he had represented PKNS

G before the Court of Appeal in *PKNS v. Ruhani Baharum* that this court is bound by the said decision. This is because there was no written grounds of why the Court of Appeal decided to overrule the High Court's decision in not striking out the plaintiffs' action against it. Abdul Rahman Sebli CJ (Sabah and Sarawak), delivering the majority judgment of the court, held:

H [12] Without the benefit of the written grounds, there was no way that the learned judge could have known of the actual reason or reasons why the Court of Appeal decided the way it did in that case. *In any case, it was wrong for him to have engaged in guesswork on the basis for the unwritten decision,* which undoubtedly had weighed heavily in his mind in deciding whether or not to allow the appellant's claim.

I …

> [15] *Nor must the court, in the absence of the written grounds, accept the argument that the appellate court in the earlier case decided the way it did because it accepted counsel's argument, even where the earlier case involved the same counsel.* Such acceptance of counsel's argument must be reflected in the written grounds of judgment. The role of counsel is to assist and the court to decide.
>
> …
>
> [23] Applying the above *ratio* to the present case, the learned judge would not have been in breach of *stare decisis* if he had chosen not to follow the decision of the Court of Appeal in *Md Sukri*. *What was required of him was to consider and apply the law according to the facts and circumstances of the case before him (Vishnu a/l Telagan) instead of tying his own hands to the unwritten decision of the Court of Appeal.* (emphasis added)

[249] Moreover, the facts in *PKNS v. Ruhani Baharum* are distinguishable from those in this instant case. The plaintiffs in that case are purchasers of Phase 1 of Anjung Sari, where, unlike in this instant case, the houses in Phase 1 were completed, and vacant possession was delivered to the purchasers. Their action against PKNS was for liquidated damages for late delivery.

[250] Per the *ratio decidendi* of the Federal Court in *Tetuan Wan Shahrizal*, it would be wrong for me in this instant case to engage in "guesswork" as to why the Court of Appeal decided the way it did in *PKNS v. Ruhani Baharum* in the absence of written grounds of judgment. What is required of me in this instant case is to consider and apply the law according to the facts and circumstances of this case instead of "tying my own hands" to the unwritten decision of the Court of Appeal in *PKNS v. Ruhani Baharum*.

[251] For this reason, I find that this court is not bound by the decision of the Court of Appeal in *PKNS v. Ruhani Baharum*.

Findings On Issue (v)

[252] Accordingly, this court finds that PKNS is obliged to construct and deliver vacant possession of houses that had been sold under the SPAs with the plaintiffs and the other purchasers of Phase 2 of Anjung Sari for the following reasons:

(i) based on the terms of the privatisation agreement in connection with the "development" of the land, as supplemented and varied by the settlement agreement;

(ii) Sazean is no longer able to undertake the construction of the houses in Phase 2 of Anjung Sari because its right to enter and occupy the land had been taken away under the settlement agreement;

(iii) PKNS' obligation under art. 2.1 of the privatisation agreement to co-operate and assist Sazean and "do all such acts and things as may be necessary so that full effect may be given to the completion of the development works planned; and

(iv) PKNS' statutory and contractual agreement – under reg. 11 of the HDR 1989 and the SPAs, respectively – to the sale of the houses in Phase 2 of Anjung Sari for the purpose stated in the SPAs.

Issue (vi): What Is The Plaintiffs' Recourse Against Sazean And/Or PKNS? Can This Court Award Specific Performance Of The SPAs?

[253] For the reasons detailed in issue (v) above, this court has found that PKNS is obliged to construct and deliver vacant possession of the houses sold in Phase 2 of Anjung Sari.

[254] However, PKNS does not want to take over the development of the houses in Phase 2 of Anjung Sari. As submitted by PKNS' counsel and as stated by its main witness, SD6, PKNS does not intend to develop Phase 2 of Anjung Sari. Instead, it wants to develop the Phase 2 land in accordance with its own plans, design, and concept.

[255] In this situation, what happens to the plaintiffs – the purchasers of the houses in Phase 2 of Anjung Sari, who are the homebuyers that Parliament had enacted the HDA 1966 to protect? Are they left with no legal recourse? Are they to accept that the houses they had purchased will not be built because the landowner, after having taken back possession of the land from the developer, does not want to build the houses sold to the purchasers?

[256] In *PJD Regency*, Tengku Maimun Tuan Mat CJ said:

> [1] The phrase "social legislation" attached to the Housing Development (Control and Licensing) Act 1966 ("HDA 1966") and its ensuing subsidiary legislation *ie*, the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989") is not merely a fanciful label. *In disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers.*
>
> [2] The question then arises: *what happens when the developers devise ingenious schemes to circumvent the law and when they are called out for it,* turn around to say that it is the home buyers who seek to make a windfall under the guise of "protection"? To our minds, this is the crux of these appeals.
>
> (emphasis added)

[257] In this instant case, the dispute is between the homebuyers, the housing developer and the landowner. The landowner in this case – PKNS – is also a housing developer. In fact, PKNS is one of the largest housing developers in Malaysia.

[258] The question one has to ask is PKNS' action in developing its land through a privatisation agreement with a third-party developer, instead of developing the land itself, one of the "ingenious schemes" devised by housing developers to "circumvent the law", as remarked by the Chief Justice in *PJD Regency*?

[259] PKNS' privatisation of the development of its land is indeed ingenious. This is because if PKNS were to develop the land itself, it would have entered into the SPAs as the housing developer; *ie*, the "vendor". As a "vendor", PKNS would be contractually obliged to develop the land and to construct the houses sold to the purchasers under the SPAs. It would also be obliged to deliver the houses purchased within 24 months from the date of the SPAs.

[260] However, by privatising the development of its land to a third-party developer, PKNS enters into the SPAs as the "proprietor". As in this instant case, when PKNS was of the view that the project was no longer economically viable to develop the land as Anjung Sari – instead of extending the "completion date for development" under the privatisation agreement or terminating the privatisation agreement – what PKNS did was to order the developer to stop work on the land, revoke the developer's right to occupy the land and take back possession of the land from the developer. It also took the deposits paid by the purchasers to the developer under the SPAs.

[261] As the facts show, after taking over the land under the settlement agreement, instead of developing the Anjung Sari project, PKNS offered the purchasers the option to terminate their SPAs in exchange, among others, with the return of the deposit they had paid with interest. It also asked Sazean to give it a written indemnity against any claims from the purchasers for the non-delivery of the houses sold. Although the plaintiffs did not agree to terminate the SPAs, PKNS refused and continues to refuse to construct the houses in Phase 2 of Anjung Sari.

[262] The reason why Sazean could not undertake the development of Phase 2 of Anjung Sari was because PKNS did not want to extend the "completion date for development" in the privatisation agreement. It was also because Sazean was required under the settlement agreement to surrender the Phase 2 land to PKNS.

[263] The facts show that Sazean did not have much of a choice but to surrender the land to PKNS because it could no longer work on the land – it had stopped work and vacated the land since 8 May 2013 as ordered by PKNS in the stop work order. Moreover, under the terms of the settlement agreement, if Sazean did not surrender the Phase 2 land to PKNS, it would have had to pay PKNS the sum of RM22,888,339.95 in outstanding PKNS' entitlement and RM6,692,609.64 in joint infrastructure cost. Also, PKNS would not have refunded Sazean the sum of RM8,453,306.22.

[264] Based on these facts, I disagree with Mr Ganapathi's submission that Sazean had "voluntarily surrendered" the Phase 2 land to PKNS. From the circumstances of the case and the terms of the settlement agreement, there was nothing voluntary in Sazean's surrender of the Phase 2 land to PKNS.

[265] PKNS, after varying the responsibility of the parties in relation to the "development work" in the privatisation agreement in Phase 2 of Anjung Sari and after taking over the Phase 2 land prior to the completion of the "development work" cannot then decide that it does not want to develop Phase 2 of Anjung Sari and save the land for new development – either by itself and through another privatisation agreement – in the future. This court disagrees with PKNS' contention that the privatisation agreement expired when the plaintiffs entered the SPAs.

[266] The facts and circumstances of this case are not as PKNS claimed. Contrary to PKNS' pleadings and submissions, the privatisation agreement did not expire when it issued the stop work order and when the settlement agreement and SPAs were made. Additionally, without written grounds of judgment, it was wrong for PKNS to claim that the Court of Appeal in *PKNS v. Ruhani Baharum* held that PKNS is not responsible for the development and liquidated damages for late delivery of Anjung Sari and that all matters related to the development of the land is under the management and responsibility of Sazean.

[267] The terms of the settlement agreement, the variation to the privatisation agreement in connection with the "development" by the settlement agreement, and PKNS' action in prohibiting Sazean from resuming the development of Phase 2 of Anjung Sari after the expiry of the "completion date for development" and in taking back possession of the land, made it impossible for Sazean to fulfil the promise made to the plaintiffs under the SPAs *ie*, to construct and deliver vacant possession of the houses purchased.

[268] The situation in this instant case can be likened to that in the Malay proverb "Gajah berjuang bersama gajah, pelanduk mati di tengah-tengah": translated into English, "when elephants fight each other, the mousedeer dies in the middle". The dispute between PKNS and Sazean – between the landowner and the developer – has left the homebuyers as collateral damage. It would cause gross injustice to the plaintiffs, and they would be denied the protection accorded to homebuyers by the HDA 1966 and the HDR 1989 if PKNS was allowed to wash its hands over the promise made in the SPAs to the plaintiffs by claiming that, notwithstanding the bargain reached with Sazean under the privatisation and settlement agreements, PKNS is not obliged to develop Phase 2 of Anjung Sari.

[269] In this situation, what happens to the plaintiffs? What protection can they be accorded by the HDA 1966 and the SPAs? Under s. 40 of the Contracts Act 1950, the plaintiffs are entitled to put an end to the SPAs. Prof Visu Sinnadurai in *Contract Act: A Commentary*, LexisNexis, 2015 at para. 40.06 said:

> Section 40 of the Contracts Act envisages two situations under which the breach may entitle the innocent party to treat the contract as being discharged: (1) refusal to perform; and (2) disability to perform.

[270] From the facts and the testimony of the witnesses during the trial, PKNS refused to perform the SPAs, and Sazean was disabled from performing the SPAs; *ie*, from constructing and delivering vacant possession of the house to the plaintiffs under the SPAs.

[271] Although the plaintiffs have the right at law to put the SPAs at end by reason of the breach, they refused to do so – even when asked by PKNS in the various offers of termination. It is trite that under common law, a promisor's refusal to perform a contract or his disability to perform the said contract, does not end the contract automatically. The non-defaulting party is merely given the option to put the contract to an end: see s. 40 of the Contracts Act 1950; *Chua Ngah Chin v. Ng Kie En* [1967] CLJU 33; [1967] 1 LNS 33; [1968] 1 MLJ 267; *Heyman v. Darwins Ltd* [1942] AC 356; *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2011] 6 MLJ 464; [2012] 1 AMCR 193.

[272] As discussed in the introduction section of this judgment, the plaintiffs have sought, among others, specific performance of the SPAs.

[273] Section 11(1) of the Specific Relief Act 1950 ("SRA 1950") provides that specific performance of a contract may be granted at the discretion of the court, except as otherwise provided in Chapter II of the SRA 1950.

[274] Section 11(1) of the SRA 1950 lists four situations in which a contract may be specifically enforced. They are:

(i) when the act agreed to be is in the performance, wholly or partly, of a trust;

(ii) when there exists no standard for ascertaining the actual damages caused by the non-performance of the act agreed to be done;

(iii) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

(iv) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

[275] There is a statutory presumption under s. 11(2) of the SRA 1950 that a breach of a contract to transfer immovable property cannot adequately be relieved by monetary compensation. Section 11(2) states:

> (2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[276] Additionally, s. 19 of the SRA 1950 expressly states that liquidation of damages is not a bar to specific performance. Section 19 reads:

> A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.
>
> ILLUSTRATION
>
> A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is not procured, A will pay B RM10,000. A refuses to apply for the licence and offers to pay B the RM10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence.

[277] The Privy Council in *Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ 457; [1982] CLJ (Rep) 58; [1982] 2 MLJ 92, made it clear that an agreement between the parties for liquidated damages, is not an admission by the parties that damages are an adequate remedy. Referring to s. 19 of the SRA 1950, the Privy Council held that an oral agreement for liquidated damages did not displace the presumption arising from s. 11(2) and did not preclude the award of specific performance in that case. Lord Russell of Killowen, in delivering the judgment of the Board, questioned the refusal of the learned judge to grant specific performance. He said:

> … If he thought that the fixing of the sum of $5,000 deprived him of jurisdiction to order specific performance he appears to have ignored s. 19 of the Specific Relief Act, the terms of which are as follows:
>
> > A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

[278] In *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors* [2000] 2 CLJ 389; [2000] 2 MLJ 257; [2000] 2 AMR 1529 ("*Loo Choo Teng*"), the Court of Appeal at p. 399 CLJ; at pp. 264 and 265 MLJ described the statutory presumption in s. 11(2) of the SRA 1950 as follows:

> However, having regard to the special circumstances of this case it would, in my judgment, be unjust to the plaintiffs to deny them specific relief altogether. It must not be forgotten that there is here a contract for the sale of immovable property.
>
> It is the kind of obligation that statute rebuttably presumes to be incapable of being remedied by an award of monetary compensation (see s. 11(2) of the Specific Relief Act 1950). …

[279] Section 20 of the SRA 1950 lists the types of contracts that cannot be enforced. One of these contracts, as stipulated in sub-s. 20(1)(a) of the SRA 1950, are contracts for which compensation of money is an adequate relief

that cannot be specifically enforced. Nonetheless, the Supreme Court in *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154; [1989] 2 MLJ 155, held that as s. 20(1)(a) is of general application and s. 11(2) of the SRA 1950 deals specifically with the contracts for the sale of land, s. 11(2) prevails in contracts relating to the sale and purchase of land. Lee Hun Hoe CJ (Borneo), delivering the judgment of the court, quoted Professor Visu Sinnadurai in *Sale and Purchase of Real Property* and said (at p. 156 CLJ; pp. 156 and 157 MLJ):

> Section 11(2) clearly says that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. It was further shown that s. 20(1)(a) is of general application while s. 11(2) deals specifically with contracts for the sale of land. *It is therefore right that s. 11(2) will prevail in cases involving contracts dealing with sale and purchase of property.* [Prof. Visu Sinnadurai] concluded his observation thus:
>
> > … The effect of these two sections is that *it is for the defendant to establish that the plaintiff would be adequately relieved by an award for damages and that specific performance should not be granted. This burden of proof on the is a heavy one and if he fails to satisfy the court of the adequacy of damages, the court will generally grant the relief to the plaintiff unless there are other special grounds against granting it.*
> >
> > (emphasis added)

[280] It follows, therefore, in this instant case, the burden is on the defendants to rebut the presumption in s. 11(2) of the SRA 1950. The burden of proof is also on the defendants to prove on a balance of probabilities that the plaintiffs will be adequately relieved by damages and why specific performance should not be granted.

[281] In deciding whether the defendants have successfully rebutted the statutory presumption in s. 11(2) of the SRA 1950 and whether it should grant specific performance against Sazean and/or PKNS, this court has asked itself the following questions:

(i) why is there no development on the Phase 2 land? Because (a) Sazean had to surrender the Phase 2 land to PKNS before it could commence the construction of the houses in Phase 2 of Anjung Sari. And (b) after it took over the land from Sazean, PKNS refused to develop Phase 2 of Anjung Sari on the land.

(ii) why did PKNS refuse to develop Phase 2 of Anjung Sari? Because it claims the privatisation agreement had expired and it is not the licensed developer of the Anjung Sari project.

(iii) why is PKNS not a licensed developer of the Anjung Sari project? Because there is no approval by the Controller of Housing under s. 8(1) of the HDA 1966 for PKNS and there is no directive by the Minister under s. 11(1)(c) of the HDA 1966 for PKNS to take over the development of Anjung Sari.

(iv) why is there no approval by the Controller of Housing or the Minister for PKNS to take over the development of Phase 2 of Anjung Sari? Because PKNS has not made a written request for Sazean to execute or procure the execution of any forms and/or documents for the purpose of PKNS taking over the development of Phase 2 and for the change in the operation of the HDA accounts.

[282] Post-trial, PKNS in its submissions offered to return the plaintiffs' deposits that it had taken from Sazean. In my judgment, the return of the deposit is insufficient relief for the plaintiffs, taking into account the statutory presumption in s. 11(2) of the SRA 1950 that a breach of contract to transfer immovable property cannot be adequately relieved by money.

[283] Furthermore, similar to the illustration in s. 19 of the SRA 1950 (reproduced in para. [276] above), PKNS in this instant case, refuses to ask Sazean to execute or procure the execution of any forms or documents for the purpose of PKNS taking over the development of Phase 2 of Anjung Sari but instead offers to return the deposits to the plaintiffs. Accordingly, as illustrated in s. 19 of the SRA 1950, the plaintiffs are entitled to have the SPAs specifically enforced if the Controller of Housing or the Minister gives the approval for PKNS to take over the development of Phase 2 of Anjung Sari from Sazeaan.

[284] I see no reason why the Controller or the Minister will not allow for PKNS to take over the development of Phase 2 of Anjung Sari from Sazean. PKNS is one of the largest developers in Malaysia and is the investment arm of the State of Selangor. Meanwhile, Sazean has been wound up and is currently in liquidation.

[285] Section 11 of the HDA 1966 empowers the Minister to give the directions for the purpose of safeguarding the interest of purchasers. Section 11 reads:

> 11. Power of the Minister to give directions for the purpose of safeguarding the interests of purchasers
>
> 1) Where on his own volition a licensed housing developer informs the Controller or where as a result of an investigation made under section 10 or f*or any other reason the Controller is of the opinion that the licensed housing developer becomes unable to meet his obligations to his purchasers or is about to suspend his building operations or is carrying on his business in a manner detrimental to the interests of his purchasers, the Minister may without prejudice to the generality of the powers of the Minister to give directions under section 12 for the purpose of safeguarding the interests of the purchasers of the licensed housing developer* –
>
> (a) direct the licensed housing developer in question to take such steps as he may consider necessary to rectify any matter or circumstance;

(b) direct that a person be appointed or himself appoint a person to advise the licensed housing developer in the conduct of his business;

(c) *direct a company to assume control and carry on the business of the housing developer upon such terms and conditions as the Minister may determine;*

(ca) certify that the licensed housing developer has abandoned the housing development;

(d) direct that the licensed housing developer present a petition to the High Court for the winding up of his business; or

(e) *take such action as the Minister may consider necessary in the circumstances of the case for carrying into effect the provisions of this Act*.

(emphasis added)

[286] To safeguard the plaintiffs' interests as purchasers of Phase 2 of Anjung Sari, the Minister may direct PKNS under s. 11(1)(c) of the HDA 1966 to assume control and carry on the business of developing Phase 2 of Anjung Sari upon such terms and conditions as the Minister deems fit.

[287] From the evidence adduced before this court, I find that the defendants have not rebutted the statutory presumption in s. 11(2) of the SRA 1950 that a breach of contract to transfer immovable property cannot be relieved by monetary compensation. They also failed to discharge their burden of proof that the plaintiffs will be adequately relieved by damages and why specific performance should not be granted.

[288] As for the plaintiffs, as the parties seeking specific performance of the SPAs, they must show to the satisfaction of this court that they are in a continuous state of readiness and willingness to perform the contract: see *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123; [1984] 2 MLJ 290.

[289] During the trial, P1, P2, P3 (who testified on his own behalf and that of his wife, P4) and P5 testified that they were ready and willing to continue with the SPAs. The evidence shows that P1 and P2 had obtained loans for payment of 90% of the purchase price of the houses purchased: P1 from Hong Leong Bank Berhad, P2 from United Overseas Bank (Malaysia) Berhad. P3, P4, and P5 testified that they would be paying cash for the balance of 90% of the purchase price in order to reduce the burden of interest payment if they were to take a loan from a bank.

[290] None of the plaintiffs were challenged by counsel for Sazean or counsel for PKNS during cross-examination on their readiness and willingness to perform the SPAs or their ability to pay for the balance of 90% of the purchase price for the houses that they had purchased. Furthermore, neither Sazean nor PKNS adduced any evidence to the contrary. Prof Visu Sinnadurai in *Law of Contract*, 4th edn, LexisNexis, 2011 at vol. 2 p. 1169 para. [14.03] said:

A In *Pakhasingh v. Kishansingh* AIR 1974 Raj 112 it was held that in a suit of specific performance of a contract of sale, the onus of proving readiness and willingness to perform his part of the contract continuously from the date of the contract till the hearing of the suit lies with the plaintiff. The onus may be easily discharged in the absence of any evidence to the contrary.

B **[291]** Accordingly, I find that the plaintiffs are ready and willing to perform the SPAs.

Findings On Issue (vi)

C (a) Specific Performance Of The SPAs

[292] For all the reasons above, I find that this court must use its discretion under the SRA 1950 to order specific performance of the SPAs for PKNS to construct and deliver vacant possession of the houses promised to the plaintiffs under the SPAs.

D **[293]** I further find that an order of specific performance against Sazean would be fruitless because Sazean, pursuant to the settlement agreement, no longer has the right to enter and occupy the land or to undertake any development works on the Phase 2 land. It is trite that courts will not indulge in a fruitless exercise: see *Dataran Rentas Sdn Bhd v. BMC Construction Sdn* E *Bhd* [2009] 3 CLJ 125; [2010] 5 MLJ 222; and *Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar & Ors v. Bursa Malaysia Securities Bhd* [2022] 4 CLJ 854; [2022] 3 MLJ 294; [2022] 4 AMR 469.

[294] Moreover, if this court does not grant an order of specific performance against PKNS, it would be akin to allowing or turning a blind eye to PKNS F – and other housing developers *qua* landowners, *ie*, housing developers acting in the capacity as landowners – to circumvent the protection accorded by the HDA 1966 and the HDR 1989 on homebuyers by "privatising" the development of their land to a third-party developer and when the development becomes uneconomic for whatever reason, to prohibit the G developer from continuing the development, to take back possession of the land, and offer the homebuyers the return of their deposits in exchange for termination of the sales and purchase agreements, as PKNS had done with Phase 2 of Anjung Sari.

[295] In this instant case, the consequences of PKNS' actions left the H plaintiffs and the other purchasers of Phase 2 of Anjung Sari high and dry. This court finds that PKNS' offer to return the deposits is not sufficient to compensate the plaintiffs for the breach of the SPAs.

[296] Surely, it cannot be the intention of Parliament that the HDA 1966 and the HDR 1989 protect homebuyers only against developers *qua* I developers but not against developers *qua* landowners. The Chief Justice in *PJD Regency* said that as the HDA 1966 and the HDR 1989 are social legislations for the protection of housebuyers, the courts have "to tip the scales of justice in favour of homebuyer".

[297] In this instant case, although PKNS entered into the SPAs *qua* landowner, by reason of the bargain reached between PKNS and Sazean in the privatisation agreement, as varied and supplemented by the settlement agreement, and the terms and conditions of the statutorily prescribed format of the SPAs, in my judgment, in order to do justice, this court must tip the scales of justice in favour of the plaintiff homebuyers and order the specific performance of the SPAs against PKNS.

(b) Liquidated Damages

[298] Clause 22 of the SPAs provides that if vacant possession of the houses is not delivered within 24 months from the date of the SPAs, the vendor *ie*, Sazean, is liable to pay the purchasers liquidated damages from the expiry of the 24-month period until the date of delivery of vacant possession of the houses. It is expressly stated in cl. 8 of the SPAs, that time shall be the essence of the contract.

[299] Under s. 56(1) of the Contracts Act 1950, failure by a promisor to perform within a specified time in a contract where time is the essence of the contract renders the contract voidable at the option of the promisee. Section 56(1) reads:

> 56. Effect of failure to perform at fixed time, in contract in which time is essential
>
> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[300] Hence, in this instant case, the SPAs are voidable at the option of the plaintiffs under s. 56(1) of the Contracts Act. Visu Sinnadurai in *Contracts Act: A Commentary, LexisNexis*, 2015 at p. 437 para. [56.03] observed that "under s. 56(1), the injured party has the option, either to avoid the contract or not to avoid the contract but to insist on performance and sue for damages. This process of election is similar to the election under s. 40".

[301] As discussed above, the plaintiffs chose not to end the SPAs. They have, instead, brought this suit against the defendants and sought orders for, among others, specific performance of the SPAs and payment of liquidated damages for failure to deliver vacant possession of the houses within 24 months from the date of the SPAs.

[302] Under cl. 7 of the SPAs, each plaintiff is entitled on their own volition to institute and maintain any action, suit, or proceedings against "the vendor or any other person" in respect of "any matter" arising out of the SPAs.

[303] In its recent decision in *Remeggious Krishnan v. SKS Southern Sdn Bhd* [2023] 4 CLJ 36; [2023] 3 MLJ 1; [2023] 4 AMR 109, the Federal Court reiterated that the HDA 1966 is a piece of social legislation enacted to protect house buyers. Harmindar Singh Dhaliwal FCJ, delivering the decision of the court, held:

> [14] In any discussion on the HDA 1966, it is necessary to allude to the purpose and objective of the legislation. It is beyond doubt that the HDA 1966 was enacted as a piece of social legislation to protect house buyers. With that in mind, any term or provision in the statute must be interpreted in a way which ensures maximum protection for the house buyers against the developer. (See *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 and *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441; [2021] 2 MLJ 60).

[304] In that case, one of the issues before the Federal Court was the interpretation of ss. 16M and 16Q of the HDA 1966. The Federal Court said that because the HDA is a piece of social legislation:

> 15. It is therefore imperative that ss. 16M and 16Q of HDA 1966 be interpreted in such a way as to provide protection of house buyers in keeping with the intention of Parliament.

[305] The Federal Court held that the phrase "same matter" in s. 16Q of the HDA 1966 does not refer to "same property". It said "if it was Parliament's intention for "the same matter" to be interpreted as "the same property" as suggested by the Court of Appeal, the drafters of the legislation would have used the term "property" or "housing accommodation". Harmindar Singh Dhaliwal FCJ said:

> [18] For the aforesaid reasons, we were unable to agree with the Court of Appeal that the words "same matter" in s. 16Q of the HDA must mean the "same property". We took the view that the "same matter" can only mean the same issue or type of claim and not the same property. We, therefore, agreed with the position of High Court that there were two different matters in the present case, *ie*, one was for technical matter and the other was for non-technical matter. As such, s. 16Q of the HDA 1966 was inoperative in the present case.

[306] It follows, therefore, that "any matter" in cl. 7 of the SPAs is not confined just to that relating to the property sold under the SPAs and that "any person" includes PKNS.

[307] Can this court, having ordered specific performance of the SPAs, also order payment of liquidated damages to the plaintiffs for the delay in delivery of vacant possession, and if yes, who is liable to pay the liquidated damages – is it Sazean or PKNS or both of them?

[308] Under s. 18(1) of the SRA 1950, the plaintiffs are entitled to seek specific performance of the SPAs as well as compensation for the breach of contract, either in addition to, or in substitution for its performance. And under s. 18(3), a court may grant an order of specific performance as well as compensation for breach of contract. Sections 18(1) and 18(3) reads:

> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> …
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
>
> ILLUSTRATION
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> A contracts with B to sell him a house for RM1,000, the price to be paid and the possession given on the 1 January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

[309] In *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633, Edgar Joseph Jr SCJ allowed the specific performance of a construction contract and granted damages in addition to the specific performance.

[310] Hence, per s. 18(3) of the SRA, an order of specific performance of the SPAs is no bar for this court to also make an order for payment for liquidated damages for the failure to deliver vacant possession of the houses within the said 24 months.

[311] Counsel for PKNS cited as authority the Court of Appeal decision in *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461; [2014] 5 MLJ 491; [2014] 2 AMCR 669, ("*Balbeer Singh No 1*") that liquidated damages can only be awarded from the expiry of the 24 months for delivery of vacant possession until PKNS' last offer of termination.

[312] In *Balbeer Singh No 1*, the developer ceased work on the Villa Perhentian Condominium after it was only 30% completed. It made various offers to refund the purchasers all the monies they had paid, which offers were all rejected by the purchasers. The developer then built a high-end condominium named "the Saffron" on the land where the Villa Perhentian Condominium should have been built. The Saffron was not a renaming of the Villa Perhentian Condominium but an entirely different development.

[313] The High Court had ordered the developer to pay damages in the sum of RM120,000 per SPA and to refund all progress payments which the purchasers had made. The developer appealed against the High Court order and allowed the appeal in part. The Court of Appeal set aside the High Court's award of RM120,000 for each of the SPAs. It did not order specific performance of the SPAs because it was no longer possible to construct the Villa Perhentian Condominium with the construction of the Saffron on the land. Instead, the Court of Appeal ordered liquidated and ascertained damages plus compensation, which was to be calculated on the basis of the difference between the market value of condominium units in the vicinity, which are comparable to the Villa Perhentian Condominium, and the purchase price. The Court of Appeal held that the period for which liquidated damages for delay is payable is from the expiry of the 36 months until the date of the last offer to the purchasers to refund the payments made.

[314] Counsel for PKNS submitted that this court is bound under the principle of *stare decisis* by the Court of Appeal's decision in *Balbeer Singh No 1* and, for this reason, can only award liquidated damages from the date of the expiry of the 24 months from the date of the SPAs until the date PKNS' offer of termination dated 7 September 2015.

[315] As shown in the table in para. [77] above, the date of PKNS' last offer of termination was 5 December 2016 and not 7 September 2015 as submitted by counsel for PKNS.

[316] Based on the Court of Appeal's decision in *Balbeer Singh No 1*, this court, in its decision delivered on 30 May 2024, ordered that Sazean and PKNS jointly and/or severally pay the plaintiffs liquidated damages from the date of expiry of the period of 24 months from the date of the payment of the deposits, which is the date of the SPAs, until 5 December 2016.

Decision

[317] Accordingly, for all these reasons, this court gives judgment to the plaintiffs and makes the following orders:

(i) it is hereby declared that Sazean and PKNS have failed to construct the houses purchased by the plaintiffs in Phase 2 of Anjung Sari housing development;

(ii) it is further declared that PKNS had failed and/or refused to construct the houses that were purchased by the plaintiffs in Phase 2 of Anjung Sari housing development even though it had taken over the vacant possession of the land on which houses were to be built and had taken delivery of the deposits paid by the plaintiffs under the SPAs for the purchases of the said houses;

(iii) PKNS is hereby ordered to complete the construction of the houses purchased by the plaintiffs in Phase 2 of Anjung Sari housing development and to deliver vacant possession of the said houses to the plaintiffs within 24 months from the date of this judgment;

(iv) Sazean and PKNS are ordered to jointly and/or severally pay liquidated damages to P1, P2, P3, and P4, and P5 at the rate of 10% of the purchase price of the houses purchased by P1, P2, P3, and P4, and P5 from the date of the expiry of 24 months from the date of the payment of the deposits for the houses under the SPAs until the date of the fourth offer of termination (*ie*, 5 December 2016) by PKNS to the plaintiffs.

[318] Interest at the rate of 5% on the late payment charges ordered from the date of this judgment until full payment.

[319] The plaintiffs are granted leave to apply for consequential orders arising from the orders made in this judgment.

[320] Sazean is ordered to pay costs in the sum of RM10,000 each to P1, P2 and P5 and the sum of RM10,000 to P3 and P4 together, subject to the allocatur fee.

[321] PKNS is ordered to pay costs in the sum of RM30,000 each to P1, P2 and P5 and the sum of RM30,000 to P3 and P4 together, subject to the allocatur fee.

Post-script

[322] This court had delivered its decision, the orders, and its broad grounds of judgment in this suit on 30 May 2024.

[323] It was only when I was writing this full grounds of judgment that I discovered that the Federal Court had, in its order of 29 October 2015, allowed the developer's appeal and had set aside the Court of Appeal's order in *Balbeer Singh No. 1* relating to the award of liquidated damages. The fact that the Federal Court had set aside the order on liquidated damages in *Balbeer Singh No. 1* is evident from the Court of Appeal's judgment in *Balbeer Singh Karam Singh & Ors v. Sentul Raya Sdn Bhd* [2021] CLJU 1546; [2021] 1 LNS 1546; [2022] 1 MLJ 30; [2021] AMEJ 1608 ("*Balbeer Singh No. 2*"), where S Nantha Balan JCA said:

> **Court of Appeal**
>
> [23] Essentially, the High Court had ordered the Defendant to pay damages in the sum of RM120,000.00 per SPA and to refund all progress payments which had been made by the Plaintiffs. The Plaintiffs were dissatisfied with the High Court's order. The Plaintiffs appealed to the Court of Appeal *via* Civil Appeal No. W-02-1490-07-2012. On 12 June 2014, the Court of Appeal allowed the appeal in part (see: *Balbeer Singh a/l Karam Singh & 6 Ors v. Sentul Raya Sdn Bhd* [2014] 7 CLJ 461; [2014] 2 AMCR 669 CA).

[24] The Court of Appeal set aside the High Court's award of RM120,000.00 for each of the SPAs, and ordered liquidated and ascertained damages plus compensation which was to be calculated on the basis of the difference between the market value of condominium units in the vicinity which are comparable to the Villa Perhentian condominium, and the purchase price.

…

[26] The Court of Appeal's order dated 12 June 2014 (with emphasis added) reads as follows:

a) *Perintah gantirugi sebanyak RM 120,000.00 oleh Mahkamah Tinggi Kuala Lumpur diketepikan dan digantikan dengan gantirugi "Liquidated and Ascertained Damages". mengikut Klausa 22(2) dan 24(2) daripada 36 bulan dari tarikh perjanjian Jual Beli masing-masing hingga 26/07/2002 dengan kadar faedah 8% setahun dari tarikh writ saman hingga Tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-kaedah Mahkamah 2012 hingga penyelesaian penuh;*

b) Perayu-Perayu diawadkan gantirugi Am untuk kemungkiran Perjanjian Jual Beli sebagai ganti kepada remedi pelaksanaan spesifik di mana pampasan dilaksikan oleh timbalan Pendaftar Mahkamah Tinggi Kuala Lumpur dengan perbandingan nilai purata pasaran unit hartanah kawasan tersebut dengan menolak harga pembelian didalam setiap Perjanjian Jual Beli dengan faedah dari hari tarikh penghakiman Mahkamah Tinggi Kuala Lumpur dengan kadar faedah 8% setahun hingga tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 hingga penyelesaian penuh;

c) Perintah pemulangan deposit-deposit dikekalkan dengan faedah 8% setahun hingga tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 dan dengan kadar faedah 5% setahun dari tarikh berkuatkuasanya Kaedah-Kaedah Mahkamah 2012 atas jumlah tersebut dari tarikh deposit dibayar hingga tarikh pembayaran penuh;

d) Kos bagi rayuan ini sebanyak RM 10,000,00; dan

e) Deposit sebagai sebahagian dari kos.

Federal Court

[27] The Defendant was dissatisfied with the Court of Appeal's order. The Defendant lodged an appeal to the Federal Court after having obtained leave. The Federal Court (per the order dated 29 October 2015) allowed the Defendant's appeal and set aside part of the Court of Appeal's order relating to the award of liquidated and ascertained damages. The Federal Court's order reads as:

(1) Rayuan Perayu dibenarkan;

(2) Perintah Mahkamah Rayuan bertarikh 12.6.2014 diubah setakat:-

(i) Perenggan (a) diketepikan;

(ii) Perenggan (b) dikekalkan;

(iii) Perenggan (c) bagi pemulangan pembayaran sebahagian dikekalkan bersama dengan faedah-faedah keatasnya pada kadar 4% pra-penghakiman dan 5% post-penghakiman dari tarikh pembayaran sebahagian telah dibayar kepada Perayu sehingga tarikh pengambilan semula ("recovery"); dan

(3) Kos sebanyak RM10,000 kepada Perayu; dan

(4) Deposit dikembalikan kepada Perayu. (emphasis added)

[324] It is indeed regrettable that counsel for PKNS, who is an officer of this court, chose to mislead this court by submitting that this court is bound by the Court of Appeal's decision in *Balbeer Singh No 1* as regards the period of award of the liquidated damages, even though the Federal Court had set aside the Court of Appeal's order in 2015.

[325] Tengku Maimun Tuan Mat CJ in *Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 8 CLJ 163; [2021] 5 MLJ 320 reminded counsels that their highest duty is to the court and that they cannot adopt a "win at all costs" mindset if it results in misleading the court. The Chief Justice said:

> [36] We pause for a moment here to note that our case law is replete with reminders to advocates – whether from the Bar or public service – of the onerous duties of those in the legal profession. The highest duty of counsel – a duty which supersedes his or her duty to his client – is his duty to the court, which remains paramount in the administration of justice. Counsel are expected to make out their client's case to the best of their abilities but they cannot adopt the mindset that they must "win at all costs" if that results in misleading the court or approbating and reprobating before different panels of the court. See generally for example: *Cheah Cheng Hoc v. PP* [1986] 1 CLJ 169; [1986] CLJ (Rep) 84; [1986] 1 MLJ 299 at p. 301 (MLJ).

[326] Counsel also did not bring this court's attention to the Court of Appeal's decision in *Tan Kok Siang v. Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546; [2018] 6 MLJ 652; [2017] AMEJ 1732, where the court ordered specific performance and liquidated damages at the rate of 10% per annum on the full purchase price, and not the discounted price, from the expiry of the 24 months from the date of the SPA until delivery of vacant possession.

[327] The Court of Appeal in *Tan Kok Siang* held that the appellant was entitled to an order of specific performance of the SPA and liquidated damages for late delivery of vacant possession. The respondent was ordered to hand over vacant possession of the property and pay liquidated damages for the late delivery per the terms of cl. 22 of the SPA. The SPA in *Tan Kok*

Siang, like in this instant case, was in the standard statutory format prescribed under s. 24 of the HDA 1966 read together reg. 11 and Schedule G of the HDR 1989. Mary Lim JCA (as she was then), delivering the judgment of the Court of Appeal, said:

> [44] For the reasons set out above, the appellant is entitled to an order for specific performance of the terms of the SPA. The respondent is obliged to hand over vacant possession and pay liquidated damages for the late delivery as per the terms of cl 22. Liquidated damages for such late delivery shall run from 10 January 2015 at the rate of 10%pa of the purchase price, which we take should be the full and not the discounted price.

[328] The plaintiffs, Sazean and PKNS have all filed appeals against the whole decision and the orders of this court and the plaintiffs have filed a cross-appeal against the decision in respect of the period of award of liquidated damages. This court on PKNS' application, had stayed the execution of the order of specific performance pending the disposal of its appeal to the Court of Appeal.

[329] Because this court's order as regards the period of payment of liquidated damages awarded was based on the misrepresentation of PKNS' counsel that the Court of Appeal's decision in respect of the liquidated damages in *Balbeer Singh No 1* is still in effect, when in fact it had been set aside by the Federal Court in 2015, I would like to invite the Court of Appeal to overturn this court's order in relation to the payment of the liquidated damages and replace it with an order that Sazean and PKNS jointly and severally pay the liquidated damages at the rate of 10% per annum of the full purchase price from the expiry of the 24 months period until delivery vacant possession of the houses in Phase 2 of Anjung Sari to the plaintiffs, in line with the Court of Appeal's decision in *Tan Kok Siang*, which under the principle of *stare decisis* is binding on this court.